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A ROMAN LAW OF EGYPTIAN ORIGIN IN THE "PASSIO SS. PERPETUAE ET FELICITATIS"

ONE of the most interesting documents of early Christianity[1] is the PASSIO PERPETUAE ET FELICITATIS, an account of the martyrdom of two Roman women, Perpetua and Felicitas, who suffered death in the persecution of A. D. 202-3. In chapter XV of these precious Acts there is a passage which is of special importance for the law historian. The Latin[2] text reads thus:

> *Circa Felicitatem vero, et illi gratia Domini eiusmodi contigit: Cum octo iam mensium ventrem haberet (nam praegnans fuerat adprehensa), instante spectaculi die in magno erat luctu, ne propter ventrem differretur (quia non licet praegnantes poenae repraesentari) et ne inter alios postea sceleratos sanctum et innocentem sanguinem funderet.*[3]

[1] A. V. Harnack, (*Die Mission und Ausbreitung des Christentums*, II, [4. ed., Leipzig, 1924], II, 892) calls it "*die ergreifendste christliche Märtyrergeschichte*".

[2] There is a Latin and a Greek text of these Acts. It seems that the Latin text is the original because the Greek has modified passages and spoils the conclusion. Corn. I. M. I. van Beek (*Passio SS. Perpetuae et Felicitatis*, [Noviomagi, 1936], I, 84-96) thinks that the same author edited the Passio in Latin as well as in Greek. But passages like chapters XXI, 3 and XVI, 3 prove that the Latin text must be the original and the Greek text is nothing more than a later translation because the play upon words found in these passages can be understood only in Latin. Cf. E. Rupprecht's Review in: *Gnomon*, XVI (1940), 143-4.

[3] *Passio SS. Perpetuae et Felicitatis*, ed. van Beek (*Florilegium Patristicum XLIII*, Bonn, 1938), chapter XV, 1-2, p. 46.

In other words Felicitas was pregnant at the time of her arrest. As the day for the spectacle in which the martyrs were going to die drew near she was in great sorrow for fear lest because of her pregnancy her martyrdom should be delayed "since it is against the law for women with child to be exposed for punishment". Her fellow martyrs were deeply grieved at the thought of leaving so good a comrade and fellow-traveler behind. So in one flood of common lamentation they poured forth a prayer to the Lord two days before the games.[4] Immediately after the prayer her pains came upon her [5] and she gave birth to a girl whom one of the sisters brought up as her own daughter.[6] "Felicitas rejoiced that she had brought forth in safety that so she might fight the beasts, from blood to blood, from midwife to gladiator, to find in her Second Baptism her child-birth washing." [7]

The law which forbade that women with child be subject to execution, to which the Acts point here, was in fact known in Roman jurisdiction. It is important that only a few years after the *Passio Perpetuae* had been composed [8] Clement of Alexandria mentions it in his *Stromata*. Comparing human law and the law of the Old Testament he says:

[4] *Ibidem*, XV, 3-4, p. 46: *Sed et conmartyres graviter contristabantur ne tam bonam sociam quasi comitem solam in via eiusdem spei relinquerent. Coniuncto itaque unito gemitu ad Dominum orationem fuderunt ante tertium diem muneris.*

[5] *Ibidem: Statim post orationem dolores invaserunt.*

[6] *Ibidem*, XV, 7, p. 48: *Ita enixa est puellam, quam sibi quaedam soror in filiam educavit.*

[7] *Ibidem*, chapter XVIII, 3, p. 52: *Item Felicitas, salvam se peperisse gaudens ut ad bestias pugnaret, a sanguine ad sanguinem, ab obstetrice ad retiarium, lotura post partum baptismo secundo.* For the *retiarius*, cf. Tertullian, *De spectaculis* 25 (*CSEL*, ed. Reifferscheid-Wissowa, XX, p. 25): *Poterit ergo et de misericordia moneri defixus in morsus ursorum et spongias retiariorum?* Cf. F. J. Doelger, *Gladiatorenblut und Martyrerblut, Eine Szene der Passio Perpetuae in kultur- und religionsgeschichtlicher Beleuchtung* (Vorträge der Bibliothek Warburg III, 1926), p. 211 ff.

[8] The *Passio Perpetuae* was known to Tertullian when he composed his work *De anima* in the year 210. Cf. chapter 55 of *De anima*.

> Human law forbids slaying the offspring and the dam together on the same day. Thence also the Romans, in the case of a pregnant woman being condemned to death, do not allow her to undergo punishment till she is delivered. The law [of the Old Testament], too, expressly prohibits the slaying of such animals as are pregnant till they have brought forth, remotely restraining the proneness of man to do wrong to man. Thus also it has extended its clemency to the irrational creatures; that from the exercise of humanity in the case of creatures of different species, we might practise among those of the same species a large abundance of it.[9]

The extant sources of Roman law prove that these two passages from ancient Christian literature are correct in their statements. Ulpianus says:

> *Praegnantis mulieris consumendae damnatae poena differtur, quoad pariat. Ego quidem, et ne quaestio de ea habeatur, scio observari, quamdiu praegnans est.*[10]

And on another occasion he writes:

[9] Clement of Alexandria, *Stromata*, II, 18, 93, 2 (vol. II, p. 163, ed. Stählin). Philo of Alexandria mentions this law, too. But he does not refer to the Romans. Cf. Philo, *De virtutibus* 18, 137-139 (pp. 247-9, ed. Colson). But observe that the law also banishes from the sacred precincts all pregnant animals and does not permit them to be sacrificed until they have been delivered, thus counting what is still in the depths of the womb as on the same footing as what has already been brought to the birth, not because creatures not yet advanced into the light rank equally with the others, but by implication to restrain contempt for that creature whose way is still growing like a plant and reckoned as part of the parent which carries it and now is at one with it, but in the course of months will be severed from the common organism; if, in the hope that it will become a living animal, safeguarded by the invulnerability of the mother, the law proposes to prevent the occurrence of the above said defilement, how much more is thus emphasized respect for creatures already brought to birth and endowed with a body and soul of their own? For it is the very height of unholiness to kill mother and offspring on the same occasion and on the same day. It was on this principle, I think, that some legislators introduced the law that condemned women who commit deeds worthy of death should, if pregnant, be kept in custody until the child is born, lest their execution should carry with it the destruction of the life within the womb.

[10] Ulpianus, *De Poenis*, 1. 3 ff.

> *Imperator Hadrianus rescripsit: Liberam quae praegnans ultimo supplicio damnata est, liberum parere, et solitum esse servari eam, dum partum ederet.*[11]

Similarly Quintillianus says: *Supplicium praegnantis lex differi in diem partus iubet.*[12]

This Roman law is the more remarkable as it is in a certain way contradictory to the principle that the embryo is no human being at all but only a part (portion) of the mother, as contemporaneous Roman jurisdiction maintained. Papianus says: "*partus nondum editus homo non recte fuisse dicitur*"[13] and Ulpianus "*partus enim antequam edatur, mulieris portio est vel viscerum*".[14] In other words, according to Roman jurisdiction a child cannot be called a human being before it has been born. Therefore I am convinced that the law which forbade the execution of a pregnant woman originated in an environment which regarded the embryo as a being with a right of existence. We know from ancient Christian writers that Christianity regarded the embryo as *homo*. Thus Tertullian says in his *Apologeticum:*

> *Nobis vero homicidio semel interdicto etiam conceptum utero, dum adhuc sanguis in hominem delibatur, dissolvere non licet. Homicidii festinatio est prohibere nasci, nec refert, natam quis eripiat animam an nascentem disturbet. Homo est et qui est futurus; etiam fructus omnis iam in semine est.*[15]

Tertullian here maintains that there is no difference whether you take away a life that is born, or destroy one that is coming to the birth because "that is a man who is going to be one".[16] In his work *De exhortatione castitatis* he makes a

[11] Ulpianus, *De Statu Hom.*, 1. 18 ff.

[12] Quintillianus, *Declamatio*, 277.

[13] *Digestae*, 35, 2, 9, 1.

[14] *Digestae*, 25, 4, 1, 1.

[15] Tertullian, *Apologeticum*, 9, 8 (p. 27, ed. Waltzing).

[16] Cf. M. Roberti, "*Nasciturus pro iam nato habetur*" *nelle fonti christiane primitive* (M. Roberti, E. Bussi e G. Vismara, *Christianesimo e diritto romano*

similar statement: *Puto nobis non magis licere nascentem nocere quam et natum.*[17] Moreover, in his treatise *De anima* the same author tells us from what moment the embryo has to be regarded as a man: *Ex eo igitur fetus in utero homo, a quo forma completa est.*[18] In other words, the embryo becomes a human being in the womb from the moment that its form is completed. St. Jerome is of the same opinion. In one of his letters he writes:

> *Sicuti enim semina paulatim formantur in uteris et tamdiu non reputatur homicidium, donec elementa confusa suas imagines membraque suscipiant.*[19]

Although Tertullian is a contemporary of the author of the *Passio Perpetuae et Felicitatis* and, in fact, has been regarded as the author of these Acts himself, I do not think that at such an early time a christian principle could have influenced Roman law. It is more probable that a culture of greater antiquity was responsible for the introduction of this law into Roman jurisdiction. In fact, we find it in Greek lawgiving. Aelian reports that the members of the Areopagus sentenced a woman poisoner to death. But she was pregnant when she was imprisoned. Therefore the judges ordered that she should not be executed before she had given birth to the child. Aelian gives this explanation for the procedure of the Areopagus: "The judges excepted the innocent child from the sentence; they condemned only the guilty woman to death".[20] But Greece is not the homeland of this human law either. We have two trustworthy sources which give us the real origin of it. Plutarch as well as Diodor report that the Greeks took it over from the Egyptians. Plutarch mentions

—Pubblicazioni della Università Cattolica del Sacro Cuore, Ser. II, Vol. 43, Milano 1935), pp. 65 ff. F. J. Doelger, *Das Lebensrecht des ungeborenen Kindes und die Fruchtabtreibung in der Bewertung der heidnischen und christlichen Antike* (*Antike und Christentum* 4, 1933), 1-61.

[17] Tertullian, *De exhortatione castitatis*, 12 (I, p. 754, ed. Oehler).

[18] Tertullian, *De anima*, 37, 3 (*CSEL*, ed. Reifferscheid-Wissowa, XX, p. 363).

[19] Jerome, *Epistula* 121, 4, 5 (*CSEL*, ed. Hilberg, LVI, p. 16).

[20] Aelian, *Varia historia*, V, 18 (p. 432, ed. Gronovius).

it as an Egyptian law which has been copied by the Greeks.[21] Diodorus of Sicily presents in chapter 77 of the first book of his *Library of History* "such laws of the Egyptians as were especially old or took on an extraordinary form, or, in general, can be of help to lovers of reading".[22] Among these he numbers the following:

> Pregnant women who had been condemned to death were not executed until they had been delivered. The same law has also been enacted by many Greek states, since they held it entirely unjust that the innocent should suffer the same punishment as the guilty, that a penalty should be exacted of two for only one transgression, and, further, that, since the crime had been actuated by an evil intention, a being as yet without intelligence should receive the same correction, and, what is the most important consideration, that in view of the fact that the guilt had been laid at the door of the pregnant mother it was by no means proper that the child, who belongs to the father as well as to the mother, should be despatched; for a man may properly consider judges who spare the life of the murderer to be no worse than other judges who destroy that which is guilty of no crime whatsoever.[23]

Here we have the proof that the law belonged to the most ancient of Egypt, was taken over from there into Greek jurisdiction, and finally incorporated into the *Jus Romanum*.

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[21] Plutarch, *De sera numinis vindicta* 7: *τὸν δ' ἐν Αιγύπτῳ νόμον ἀρ' οὐκ εἰκότως ὑμῖν ἀπογράψασθαι δοκοῦσιν ἔνιοι τῶν Ἑλλήνων, ὃς κελεύει τὸν ἔγκυον, ἂν ἁλῷ θανάτου, μέχρι τέκειν φυλάττειν.*

[22] Diodorus of Sicily, I, 77 (p. 263, ed. Oldfather).

[23] *Ibidem*, p. 267.

PROVISIONS FOR THE PASTOR AFFECTED BY PENAL ADMINISTRATIVE DEPRIVATION

A PERPLEXING problem arises when the Ordinary has deprived a negligent pastor of his parish according to the prescriptions of the special penal administrative process of the Code. That problem is this: what is to be done with or for the pastor who has been so deprived? In canons 2182-2185 and 2382 the Code is silent about the matter.

In case the pastor has recourse to the Holy See, whether within or outside of the proper time limit of ten days, it can and sometimes does happen that the Holy See will instruct the Ordinary how to provide for the pastor who has been deprived of his parish. But in the event that the Holy See does not so provide, and again in the case wherein no recourse has been lodged, the problem still remains.

The procedure to be used against a pastor who has been culpably and seriously negligent in his parochial duties culminates in the pastor's penal deprivation of the parochial benefice. The process, which is a penal even though administrative one, is complete in itself and independent of those processes [1] whose specific purpose is rather *the fact of removal* from office apart from any penal measure. They are non-penal administrative procedures, which do not take into consideration the criminal causes, but are rather special processes which the Ordinary may invoke with a view to promoting the salvation of souls. The removal which is effected by these two processes is not necessarily intended as a punishment, while in the procedure against a negligent pastor the procedure defi-

[1] Tit. XXVII: *De modo procedendi in remotione parochorum inamovibilium*, canons 2147-2156, and tit. XXVIII: *De modo procedendi in remotione parochorum amovibilium*, canons 2157-2161.

nitely has the character of a vindictive penalty. Therefore the Ordinary is not inherently bound to provide for the pastor whom he has by penalty deprived of office or benefice *in the same manner* as he is urged to do for the one whom he has merely *removed* from office or benefice for reasons of ineffectual parochial administration, as contemplated in canons 2154-2156. The pastor who is merely removed should be given another parish, or benefice, or at least an adequate pension.[2] What is to be done with or for the pastor who has been deprived of his parish through this penal administrative process?

The few canonists who have commented on this particular point are of the opinion that if the pastor thus deprived is not financially able to take care of himself, both Christian charity and the honor of the sacerdotal office demand that some kind of equitable provision be made for him. In other words, the Ordinary has an obligation *in charity and natural equity* to provide for him.[3]

It seems more tenable, however, to maintain that the Ordinary has an obligation to provide for the pastor not only in charity and equity but also in justice. An attempt is herewith made to prove this contention from the following considerations. First of all, the Code[4] enacts that once a cleric has obtained an irremovable benefice, he cannot be deprived of

[2] Canon 2154, § 1. Cf. Suarez, *De Remotione Parochorum* (Romae, 1931), nn. 74-87; Noval, *De Processibus* (2 vols., Augustae Taurinorum-Romae: Marietti, 1920-1932), II, nn. 585-593; Coronata, *Institutiones*, III, (Taurini: Marietti, 1933), n. 1593, VI; Wernz-Vidal, *Ius Canonicum* (7 tom in 8 vols., Romae: apud Aedes Universitatis Gregorianae, 1923-1938), VI, nn. 761-762; Connor, *The Administrative Removal of Pastors* (The Catholic University of America, Canon Law Studies, n. 104, Washington, D. C.), pp. 125-137.

[3] Muñiz, *Procedimientos Eclesiásticos* (2. ed., 3 vols., Sevilla), I, p. 659; Augustine, *A Commentary* (4 ed., 8 vols., St. Louis, 1921-1929), VII, p. 468; Suarez, *De Remotione Parochorum*, n. 205; Jansen, *Canonical Provisions for Catechetical Instructions* (The Catholic University of America, Canon Law Studies, n. 107, Washington, D. C.), p. 73.

[4] Canon 2299, § 1: "Si clericus beneficium inamovibile obtineat, eodem in poenam privari potest solum in casibus iure expressis; si amovibile, etiam ob alias rationabiles causas . . . § 3: Nequit clericus privari beneficio aut pensione cuius titulo ordinatus fuit, nisi aliunde eius honestae sustentationi provideatur, salvo praescripto can. 2303, 2304."

that benefice or parish except in the cases expressly designated by the law; on the other hand, a removable beneficiary may be deprived for other reasons also. Furthermore, except for the different rulings which obtain for the cases mentioned in canons 2303 and 2304, a cleric cannot be deprived of the benefice or pension which constitutes the title for his ordination (*titulus ordinationis*), unless in some other way proper provision be made for his decent support. The cases in which a different ruling obtains are those in which the penalties of deposition and of privation of the right to wear the ecclesiastical garb have been incurred. Both of these constitute graver penalties than that whereby a pastor is deprived of his parochial office. By deposition a cleric loses even that benefice or pension which served as his title for ordination, but if he does not have any other means of living or a sufficient revenue for decent support, the Ordinary should *in his charity* provide for him in the best possible manner so that he will not be constrained to the disgrace of the clerical state to become a beggar. This obligation on the part of the Ordinary is one of charity only and not one of justice.[5] If the deposed cleric does not show any signs of amendment, and especially if he continues to give scandal and refuses to heed new warnings, the Ordinary is authorized to deprive him permanently of the right to wear the ecclesiastical garb. A priest or cleric who has been thus punished loses all claim to even a charitable support by the Ordinary.[6]

The Code in canons 2182-2185 and 2382 does not explicitly make any provisions for the pastor who has been administratively deprived because of grave negligence in pastoral duties. There can be some doubt whether canons 2154-2156 can be classed as parallel canons, since the nature of the process is different and these canons have reference only to those pastors who have been administratively *removed*.[7] The pre-Code

[5] Canon 2303, § 2.

[6] Canon 2304, § 2.

[7] Cf. canon 18: "Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et

legislation in the decree "*Maxima cura*" made provisions for the pastor who was removed, but again the administrative process under this decree was not a *penal* procedure, with the result that there is doubt whether canon 6 of the Code can be applied.[8]

An ecclesiastical office[9] is lost through resignation, removal, transfer, the lapse of the predetermined time for the span or duration of which the office was conferred, and finally, through deprivation.[10] With secular clerics an ecclesiastical office is closely connected with their title of ordination (*titulus ordinationis*).[11] This flows from the fact of his ordination, because he should have a livelihood according to his dignity.[12] No one of the secular clergy should be ordained unless in the prudent judgment of the bishop he is useful or necessary to the diocese,[13] and the Ordinary must in justice confer on such

obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum."

[8] Canon 6, n. 2: "Canones qui ius vetus ex integro referunt, ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt aestimandi; n. 3: Canones qui ex parte tantum cum veteri iure congruunt, qua congruunt, ex iure antiquo aestimandi sunt; qua discrepant, sunt ex sua ipsorum sententia diiudicandi; n. 4: In dubio num aliquod canonum praescriptum cum veteri iure discrepet, a veteri iure non est recedendum."

[9] Canon 145, § 1: "Officium ecclesiasticum lato sensu est quodlibet munus quod in spiritualem finem legitime exercetur; stricto sensu est munus ordinatione sive divina sive ecclesiastica stabiliter constitutum, ad normam sacrorum canonum conferendum, aliquam saltem secumferens participationem ecclesiasticae potestatis sive ordinis sive iurisdictionis. § 2: In iure officium ecclesiasticum accipitur stricto sensu, nisi aliud ex contextu sermonis appareat."

[10] Canon 183, § 1. This is an exhaustive enumeration. Cf. Augustine, *A Commentary*, II, p. 154; Coronata, *Institutiones*, I, (2. ed., 1939) n. 255; Wernz-Vidal, *Ius Canonicum*, II, n. 322; Vermeersch-Creusen, *Epitome*, I, (5. ed., Mechliniae, 1934) n. 269.

[11] Canon 979, § 1: "Pro clericis saecularibus titulus canonicus est titulus beneficii, eoque deficiente, patrimonii aut pensionis. § 2: Hic titulus debet esse et vere securus pro tota ordinati vita et vere sufficiens ad congruam eiusdem sustentationem, secundum normas ab Ordinariis pro diversis locorum et temporum necessitatibus et adiunctis dandas."

[12] Canon 974, § 1: "Ut quis licite ordinari possit, requiruntur: . . . n. 7. Titulus canonicus, si agatur de ordinibus maioribus." Cf. canon 2373, n. 3.

[13] Canon 969, § 1.

priests an ecclesiastical benefice, office or subsidy sufficient for sustenance, even when these priests were ordained under the title of service to the church or mission.[14] If none of the three titles mentioned above (canon 979, § 1) is available, the title of service of the diocese (*titulum servitii dioecesis*), or, in the places subject to the Sacred Congregation for the Propagation of the Faith, the title of the mission (*titulus missionis*) may be substituted for secular clerics.[15] Thus, it is seen that every secular priest ordained, whether for the service or a diocese or for the mission, must be given a benefice, office or subsidy sufficient for a decent living. Further, this title is not lost by deprivation of that benefice or office except in cases of deposition and of privation of the right ever to wear the ecclesiastical garb.[16]

Now certainly the deprivation mentioned in canons 2182-2185 and 2382 is not equivalent to resignation from office or benefice. Even in the cases of resignation the Ordinary cannot licitly accept the resignation of a beneficed cleric in major orders unless he is certain that the beneficiary has other means of decent support. Proof to this effect must be given before the Ordinary can lawfully accept such a resignation, which in effect means that the Ordinary is charged with actually holding him to his office until such proof is forthcoming.[17] A title (*titulus*) may be lost in several ways, but each such loss involves a certain obligation for substituting a new title. By way of corresponding application the same principle obtains with relation to offices which are capable of inclusion under one and the same title. The resignation of a benefice which constituted the cleric's title of ordination will be null and void unless express mention is made by the cleric that he has been ordained to that title and also that with the consent of the

[14] Canon 981, § 2: "Ordinarius presbytero, quem promoverit titulo servitii ecclesiae vel missionis, debet beneficium vel officium vel subsidium, ad congruam eiusdem sustentationem sufficiens, conferre."

[15] Canon 981, § 1.

[16] Canon 2299, § 3.

[17] Canon 1484.

Ordinary another legitimate title of ordination has been substituted for it.[18] Therefore, a pastor who resigns must be provided for by his Ordinary.

The second manner of losing an office or benefice is by removal. As mentioned before, those who have been administratively removed are to be provided for by the Ordinary according to the norms prescribed for such cases in canons 2154-2156. It is obvious that penal administrative deprivation is not the same as non-penal administrative removal.[19]

From the very nature of transfer and the lapse of time, the incumbents of ecclesiastical offices are provided for by the Ordinary when they lose such offices through these two methods. Transfer involves the loss of one office with the subsequent provision for another, while the incumbent of an office which is lost with the lapse of time for which he was appointed must be given another office or benefice when his incumbency in the previous one has expired.[20]

By this process of elimination, then, the conclusion is reached that a pastor who has been deprived of his parish because of his grave negligence in parochial duties must be provided for by his Ordinary in much the same manner as is prescribed for other cases of deprivation in relation to which the ruling of canon 2299, § 3, obtains. Penal administrative deprivation is the fifth way in which an office can be lost, and can not be identified with any of the four ways just described, that is, with resignation, removal, transfer and expiration of office in view of the lapse of the predefined time limit of its incumbency. Now canon 2299, § 3, requires provision at least of an honorable sustenance for all those who suffer a deprivation of office with the exceptions noted regarding those who are deposed or permanently barred from wearing the ecclesiastical garb. Therefore, it follows that the Code provides in canon

[18] Canon 1485. The legitimate titles to be substituted are those mentioned in canons 979-981.

[19] Cf. *supra*, footnote n. 2.

[20] Cf. canons 193; 2162-2167; 981, § 2.

2299, § 3, for those who are deprived of their parochial benefice for their negligence.

The writer has not found any author who, in his commentary on canon 2299, lists the negligent pastor's deprivation of his parochial office through the penal administrative process here discussed as being among the cases concerning which the law specifies that an irremovable pastor's deprivation of his parochial benefice is to be effected as a canonical punishment.[21] An examination of the index of Gasparri's edition of the Code of Canon Law as well as the Vatican edition has yielded the same negative result.[22] Yet the cases listed all imply that proper provision should be made to furnish the punished cleric with a decent sustenance. It is by invoking the argument of analogy, therefore, that one may conclude that the same ruling should obtain in all these cases alike, for when the aim and scope of the law are the same in divers cases, then also may one assume a like disposition and application of the law in all these cases whenever no directly contrary provision is indicated for some expressly excepted cases.

Further, it is interesting to note that while the cases coming under the procedure in canons 2382 and 2182-2185 are not listed in any of these catalogues of deprivations, the deprivations resulting from the use of the two preceding processes *are* found. These are the procedures against clerics who are guilty of non-residence and against clerics who are guilty of concubinage. Both of these latter processes are essentially the same as the one to be used against gravely negligent pastor,

[21] Cf. Calucci, *Il Diritto Penale secondo il Codice di Diritto Canonico,* (Subiaco, 1926) I, pp. 316-317; Eichmann, *Das Strafrecht des Codex Iuris Canonici,* (Paderborn, 1920), p. 117; Augustine, *A Commentary,* VIII, p. 257, note 7; Wernz-Vidal, *Ius Canonicum,* VII, n. 349, E; Coronata, *Institutiones,* IV, Taurini: Marietti, 1935) n. 1830; Chelodi, *Ius Poenale,* (4. ed., Tridentini, 1935) n. 51.

[22] *Privati sunt ipso facto:* canones 2396; 2398; 2266; 2397. *Privandi sunt:* canones 2314, § 1, n. 2; 2384; 2177, n. 3 cum 2180, 2181 et 2359, § 1; 2331, § 2; 2354, § 2; 2340, § 2; 2343, § 2, n. 3; 2359, §§ 2-3; 2368, § 1; 2345; 2346; 2350, § 2; 2381, n. 2. *Privari possunt:* canones 2360, § 2; 2355; 2324; 2405; 2394, n. 2; 2403; 2336, § 1; 2336, § 2; 2359, § 3; 2401.

and all three are penal administrative processes.[23] Why do the authors and the indices of the Code seemingly exclude the deprivation visited upon a neglectful pastor in virtue of canons 2184-2185 from their lists in the interpretations of canon 2299, § 1?

Possibly the explanation must be sought in the fact that canon 2382, as constituting a part of the penal legislation of the Code in Book Five, does not use the word deprive (*privetur*) but simply reads "*coerceatur ad normam can. 2182-2185.*" Again, canon 2184, in speaking of the conclusion of the process against an incumbent of a removable parish, uses the words "*privari potest,*" while canon 2185, in speaking of the conclusion of the same kind of procedure against an irremovable pastor, states that the Ordinary should remove (*removeat*) this pastor from his parish. From the very nature of the process, which ultimately deals out for the irremovable pastor the same punishment that is visited upon a removable pastor, and from the intimate relationship of canon 2382 to canons 2184 and 2185, it seems readily deducible that the word "*coerceatur*", when understood in the most intensive form of the graduated meanings that attach to it, is to be regarded as identical with the term "*privetur*".[24]

Further, canon 192, § 2, states that when there is question of an irremovable incumbent in office, the Ordinary can deprive such a cleric of his office but only by the means of a process "*ad normam iuris.*" Again, canon 454, § 1, states that even though pastors must be appointed to a permanent incumbency in their parishes, they may be removed from their parishes "*ad normam iuris.*" The process whereby a negligent pastor, whether removable or irremovable, is deprived of his parish "*ad normam iuris*" is found exclusively delineated in canons 2382 and 2182-2185. Nowhere in the Code is it

[23] Cf. Coronata, *Institutiones*, I, nn. 266-267; Wernz-Vidal, *Ius Canonicum*, II, n. 361, A; VI, n. 777; Suarez, *De Remotione Parochorum*, n. 1; Rossi, *De Paroecia*, (Romae, 1923) nn. 285-293; Vermeersch-Creusen, *Epitome*, I, n. 308; Noval, *De Processibus*, II, nn. 474-475.

[24] Canon 18: "Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; . . ."

stated that the phrase "*ad normam iuris*" refers to judicial processes alone. The fact that the processes outlined in canons 2168-2175 and in canons 2176-2181 with their penal consequence—deprivation—are brought under the ruling of canon 2299, § 1, seems to justify the conclusion that *all* penal administrative processes, inclusive of the one that is employed against a negligent pastor, should be brought under that same ruling. There is nothing in canons 2299, 2382, 2182-2185, 979-981, 183, § 1, 192 and 454, § 1, that militates against such an assumption. On the contrary, this assumption seems rather to be favored by all these canons. If one were not ready to concede this he would be confronted with the following situation: Pastors who have been *removed* administratively will have provision made for them in accordance with the norms of canon 2154-2156; pastors who have been *deprived* either judicially or administratively, to the exclusion, however, of those who are deprived according to the rulings contained in canons 2182-2185, will have provision made for them according to the prescription of canon 2299, § 3. Why should the procedure against a negligent pastor stand apart from other penal administrative procedures as an exception? Why should it have different juridical consequences when all these procedures alike involve deprivation as a punishment for delictual conduct? The procedure outlined in canons 2182-2185 surely involves a deprivation which is juridically effected "*ad normam iuris.*" In fact, this procedure is the only one that the Code provides for use against negligent pastors.

Moreover, a negligent pastor, though he stands convicted as a result of the procedure used against him, had not forfeited the rights which he acquired through his incardination into the diocese.[25] While it is true that he has been criminally negligent in the performance of his parochial duties, and has been legitimately deprived of his parish according to the pre-

[25] Canon 111, § 1: "Quemlibet clericum oportet esse vel alicui dioecesi vel alicui religioni adscriptum, ita ut clerici vagi nullatenus admittantur. § 2: Per receptionem primae tonsurae clericus adscriptur seu, et aiunt, *incardinatur* dioecesi pro cuius servitio promotus fuit." Cf. canons 116 and 117, n. 1.

scriptions of canon law, it by no means follows that in the event he cannot take care of himself financially he has to depend on the charity of his bishop. If the obligation to provide for him is one of justice, then the financial condition of the pastor is an irrelevant factor. He still is a member of the diocese into which he was incardinated, and he has the right and the obligation to work therein, subject of course to the authority of the Ordinary.[26]

In view of these considerations one may rightfully conclude that the pastor who has been deprived of his parish according to the process outlined in canons 2382 and 2182-2185 has a right *in justice* to a decent sustenance and honorable support from his diocese according to the specific provision made by the Ordinary. This right perdures as long as it is not forfeited through the incurred punishments of deposition or of the perpetual privation of the right to wear the ecclesiastical garb. In the former of these two cases the appeal for support can be based only on the claims of Christian charity; in the latter even such an appeal is no longer acknowledged. It appears, then, that the Ordinary must under the dictates of justice provide in some way for the pastor whom he deprived of his parochial office and benefice in punishment of his parochial negligence. The Ordinary may appoint him to some incumbency or charge to which there is not attached the care of souls in a pastoral way. Such an assignment could embrace the performance of duties connected with the incumbency of a non-parochial ecclesiastical benefice or office. It could also include the performance of duties which are of a more or less occasional nature, such as the administrative, directional or secretarial work attendant upon various diocesan enterprises, the giving of lecture courses, the supervision of certain building projects, the promotion of certain features in the aims and purposes of organizational activities, and the like. Even a long record of pastoral neglect may in no way be an indication of a like remissness in other endeavors. In fact it may well be that the work of a non-parochial nature proves to be the

[26] Cf. canons 127; 117; 128.

work in which, because of its properly congenial nature and character, the incumbent finds the necessary stimulation to evince an exemplary devotion to duty.

Under the former legislation of the decree "*Maxima cura*" the law of the Church insisted on the making of proper provision for the pastor who was removed from his parochial office.[27] Cappello notes that the canonists with few exceptions taught that the cleric who was removed should be provided for in the best manner possible as long as he was not incorrigible and contumacious. This must be understood in the sense that the pastor was not incorrigible and contumacious *after* the removal process was completed.[28]

It is evident, of course, that an unworthy and negligent pastor must have been incorrigible and contumacious *before* the Ordinary could proceed to deprivation by means of this penal administrative process. The pastor is canonically admonished, reprimanded, punished, deprived in part or in whole of the fruits of his benefice, and finally when a lack of amendment is still evident, deprived of the parochial benefice itself. It is thereupon that an obligation in justice rests upon the Ordinary to provide for the decent support of the deprived pastor, unless the latter continues to be incorrigible and contumacious by refusing in a spirit of disobedience to comply with the Ordinary's plan to make the proper provision for him. In such an event the recalcitrant priest would simply invite the application of still sterner penalties. In the case of deposition he would forfeit all claims save those of Christian charity for his continued honorable support. In the further event of his permanent privation of the right to wear the ecclesiastical garb he would surrender even the claims of Christian charity.

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[27] Canons 26, 27, 28, 29; cf. Cappello, *De Administrativa Amotione Parochorum* (Romae, 1911) pp. 113-117.

[28] Cf. Noval, *De Processibus*, II, nn. 585-590; Suarez, *De Remotione Parochorum*, nn. 75-80; Coronata, *Institutiones*, III, n. 1593, VI; Claeys-Bouuaert, *De Canonica Cleri Saecularis Obedientia*, (Louvain, 1904) pp. 315-318; Wernz-Vidal, *Ius Canonicum*, VII, n. 349, VIII, c.

Cases and Studies

DE PROCESSU SUPER MATRIMONIO RATO ET NON CONSUMMATO

The Catholic teaching on the dissolubility of unconsummated Christian marriages is stated in Canon 1119:

> "*Matrimonium non consummatum inter baptizatos vel inter partem baptizatam et partem non baptizatam dissolvitur . . . per dispensationem a Sede Apostolica ex justa causa concessam, utraque parte rogante vel alterutra, etsi altera sit invita.*"

That the power of dispensing here asserted be properly employed, it is important that the two elements required for its exercise, namely, the fact of non-consummation and the existence of a just cause, be duly established "*ad tramitem juris communis*".

Since the Holy See, to whom exclusively this power of dispensing belongs, for obvious reasons cannot well conduct this inquiry itself, it has long been its custom to communicate to the local ordinaries the faculty to do so. The decree *Catholica Doctrina* of the Sacred Congregation of the Sacraments, dated May 7, 1923,[1] establishes certain rules and norms designed to facilitate the work of instructing this process. In these *Regulae servandae in processibus super matrimonio rato et non consummato* will be found collected the various prescriptions of Canon Law pertinent to the subject, to which are added others suggested by the special nature of the process.

To these *Regulae* must be appended the decision of the Holy Office, January 27, 1928,[2] asserting its exclusive competence when one of the parties to the marriage is a non-Catholic, and the subsequent instructions (March 27, 1929) [3] of the Sacred Congregation of the Sacraments concerning practical measures to be adopted to prevent a possible fraudulent substitution of persons.

[1] *AAS*, XV (1923), 389

[2] *AAS*, XX (1928), 75.

[3] *AAS*, XXI (1929), 490.

The clear, definite and complete instructions contained in the *Regulae*, supplemented as they are by numerous formularies found in the appendix, have proven, as was to be anticipated, an invaluable aid to local Curias and have succeeded in eliminating many of the uncertainties and practical difficulties formerly associated with this work. The following brief comments on the instructions contained in the *Regulae* are intended to illustrate a few practical aspects of the process.

I

Nature of Process

The decree *Catholica Doctrina* emphasizes the fact that cases for dispensation, since they originate not from a criminal or contentious action but from a benign concession of the Holy See, are not, strictly speaking, judicial—*non vere judiciales*, but rather administrative—*gratiosae seu administrativae* — in character. This in no way implies that the investigation lacks full judicial powers, since in point of fact the process is initiated and proceeds in the name of, and with complete delegated powers received from the Holy See.[4] It implies merely that the main purpose of the inquiry is not to protect or vindicate the rights of individuals but rather to compile in the name of the Holy See as complete information as possible on the merits of the dispensation sought. Hence it is that there is no plaintiff but a *petitioner-orator* or *oratrix;*[5] there is no publication of the acts;[6] the testimony is surrounded with secrecy,[7] and there is no formal representation of the parties by counsel.[8]

Since the process is conducted through a direct commission and in the name of the Holy See, it follows that the local court delegated for that purpose is charged with the main responsibility of prose-

[4] "Quare quae iudex discernit aut ordinat, vera iussa faciunt quibus parere necesse est; ac inobedientes fiunt contumaces."—Decree *Catholica Doctrina.*

[5] *Reg.*, n. 5, § 2.

[6] Canon 1985; *Reg.*, n. 97.

[7] *Reg.*, n. 46.

[8] In the letters of the Sacred Congregation of Sacraments transmitting to the Ordinary the faculty to instruct the process, it is usually stated: "Moneatur pars oratrix operam sive advocatorum sive procuratorum minime requiri, Sacra Congregatio enim in hisce causis procedit omnino ex officio cum votis suorum consultorum." The employment of counsel as advisers to the parties is not however forbidden.

cuting the inquiry, and upon it rests the obligation of obtaining full information touching on the merits of the case. For this reason all witnesses who may be considered to possess any useful knowledge should be heard, and if not included in the list of witnesses submitted by the parties, should be cited *ex officio*.[9] So, too, all important documents, for example, copies of divorce proceedings and decrees, physicians' certificates, pertinent letters or correspondence, etc. should be sought for inclusion in the records,[10] which records, for obvious reasons, should show that all possible diligence has been expended by the court in exploring every avenue of useful information. Again, while all the rules of formal procedure are to be scrupulously observed where possible, their observance, naturally, is to be subordinated to the chief purpose of the inquiry, namely, the compiling of all necessary and useful information, and no practical means of securing this information is to be neglected even if in doing so the normal procedure cannot be employed. Thus, should the *pars conventa*, for instance, be unable or unwilling to appear before the court, either at the seat of the tribunal or elsewhere, provision should be made to receive his testimony in other ways, through the parish priest or other qualified person.[11] It may be here noted that in the event that the *pars conventa* is unwilling to give formal testimony, though he may be declared *contumax*, it will be found useful in an effort to complete the record to secure from him, if possible, at least an extra-judicial statement on the merits of the case. The same holds true in the case of witnesses possessing important information. In all instances, however, where it has not been possible to follow literally the procedure prescribed by the *Regulae*, care should be taken, as the *Regulae* suggests, to note this fact and its reasons in the acts.[12]

II

Conditions for Dispensation

The valid exercise of the power of dispensing is dependent upon the fact that the marriage in question has never been consum-

[9] *Reg.*, n. 62.

[10] *Reg.*, nn. 75, 76.

[11] Cf. *Reg.*, n. 24, § 1, § 2, § 3, § 4; cf. Can. 1770, § 2, § 4.

[12] *Regulae passim*, v.g. n. 24, § 4.

mated.[13] The purpose of the inquiry is to establish this fact in the manner prescribed by law. Hence, unless the acts of the process show conclusively, i.e. with moral certainty, that the marriage has not been consummated, no dispensation will be accorded.

The problem of consummation, particularly if considered in relation to the many questions suggested by the impediment of impotence, can be a rather involved one. The consideration of the problem in its purely theoretical aspects, however, belongs more properly speaking to the judicial process of nullity. The administrative process, with which we are here concerned, limits itself more directly to the investigation of the fact of non-consummation, and thus, in accordance with the accepted canonical definition,[14] considers as consummated any marriage in which a *penetratio cum seminatione intra vaginam* has taken place, even though this *penetratio* be only a partial one.

It is, of course, possible to argue about the precise degree of penetration required to permit a *seminatio intra vaginam*, but if the evidence shows that any *seminatio* has accompanied a partial penetration, it will be presumed, until the contrary be conclusively shown, to have taken place within the vagina, and hence, the fact of non-consummation, for all practical purposes, will be considered unproven.

The second condition required for the dispensation is the exist-

[13] The decree *Catholica Doctrina* requires that the Judge, before administering the oath during the hearing of testimony, should solemnly warn the parties, witnesses and experts that, "si matrimonium ratum reapse fuerit consummatum, et veritas in processu non detegatur, vel ex culpa aut oscitantia tribunalis, vel ex fraude aut desidia partium et testium, pontificia dispensatio forte obtenta, utpote suo fundamento destituta, nullius est valoris; et matrimonio, quod dispensatum ducitur, in suo valore permanente, si partes vinculo matrimoniali se solutas existiment, et aliud matrimonium in facie Ecclesiae ineant, hoc revera est invalidum, proindeque putati coniuges filiique forte progeniti, graviorum malorum vinculis pene inextricabilibus implicantur."

[14] Copula conjugalis perfecta fit per "penetrationem vaginae et effusionem veri seminis in ea"—Cappello, *De Sacramentis*, III, 342, (ed. 4. Romae, 1939) "Copula est actio qua semen verum modo naturali in vaginam mulieris effunditur"—*ibid.* "Copula est actio qua vir verum semen modo naturali effundit in vaginam mulieris"—Wernz-Vidal, *Jus Canonicum*, V, 218, (ed. 2. Romae, 1928). "Ex parte viri consistit in penetratione vasis mulieris et completur effusione seminis"—Noldin, vol. I, *De Sexto Praecepto*, 64, (ed. 29, Oeniponte, 1937).

ence of a just cause.[15] This will usually be found in the impossibility of reconciling the parties, arising from a state of enmity or lack of love between them, often explainable through the inability of either to render the rights of marriage, or from other facts. However, this impossibility of reconciliation, since it can be remedied through a decree of separation, might not be deemed in itself sufficient. It would become a sufficient cause when, as usually happens, it is associated with a desire to contract another marriage, the need of convalidating an attempted civil marriage, or the general danger of incontinence.

Thus in practice it will be found that, in individual cases, not one cause but a combination of causes may be urged for the dispensation. Obviously the likelihood of the dispensation increases with the number and seriousness of the causes that can be alleged for it.

On the other hand, the mere desire or consent of the parties, unsupported by other causes, would scarcely be considered a sufficient reason for the dispensation.[16]

III

The Libellus Supplex

The petition for the dispensation, or *libellus supplex*, containing a full and accurate account of the circumstances of the case together with a statement of the causes for which the dispensation is sought,

[15] The following summary of the principal causes for the dispensation is given by Cappello: 1° animorum dissociatio quin affulgeat futurae reconciliationis spes; 2° timor probabilis magni scandali futuri, discordiarum et rixarum inter consanguineos; 3° probabilis suspicio impotentiae cum periculo incontinentiae; 4° divortium civile ab altera parte obtentum cum periculo incontinentiae partis innocentis; 5° semiplena probatio defectus consensus, aut alterius impedimenti; 6° morbus contagiosus superveniens; 7° periculum perversionis, ut si quae cum haeretico contraxisset; 8° si quis aliud matrimonium equidem nullum deinde inierit, a quo se aliter liberare nequeat, v.g. matrimonium civile"—Cappello, *De Sacramentis*, III, 762. (ed. 4. Romae, 1939). A similar summary may be found in Viscont, *De Matrimonio Rato et non Consummato*, (Romae, 1928) p. 15.

[16] Vide Cappello, *loc. cit.* The importance attached by the S. Congregation of Sacraments to the establishment of grave and sufficient causes for the dispensation is apparent from instructions contained in recent letters transmitting the faculty to local Ordinaries requiring the Defender of the Bond "ut diligenter percontetur utrum causae, ad petitae gratiae validitatem tutandam allatae, reapse existant et uti graves sufficientesque habendae sint".

is to be prepared and signed by the petitioner[17] and then transmitted to Rome together with his *informatio* by the proper Ordinary described in the *Regulae*.[18]

It frequently happens that the *oratrix* in presenting the petition for the dispensation, exhibits, as evidence that the marriage was not consummated, a physician's certificate attesting her state of virginity. In instances where the *oratrix* contends that she is in complete possession of her physical integrity but has no certificate from a reputable physician to attest this fact, it is the custom of some Curias to suggest, before forwarding the petition to Rome, that she be examined by a physician and obtain from him an appropriate certificate.

While the *Regulae* nowhere suggest it, and although this examination can in no sense be styled or be accepted as a substitute for the *inspectio canonica*, there is much practical wisdom to recommend the practice. Firstly, by bringing out from the very beginning the full facts, it protects the court against possible surprises revealed by the *inspectio canonica*. Secondly, it serves a useful purpose in the protection, so to speak, of the evidence derived through the *argumentum physicum;* for in the interval between the sending to Rome of the petition and the formal instruction of the process, many things may happen to affect the condition of the petitioner. Accidents may occur, or serious illness may develop, the treatment of which may require various sorts of remedies or even operations impairing the probative value of the canonical inspection. It will greatly add to the force of the certificate if this suggested private examination be performed by a reputable physician familiar with the conduct of examinations of this sort, as well as with the canonical concept of consummation, who can later give valuable testimony as a witness in the case. Finally, for obvious reasons, it will be well to suggest that the identity of the person examined be well established by the physician at the time of the examination.

The *Regulae*[19] state that no petition for a dispensation will be entertained, should it become apparent at any time, either before or after the process has begun, "that the consummation of marriage was made frustrate through the practice of onanism." Only when certain conditions are verified, namely, when the petitioner has been

[17] *Reg.*, n. 6.

[18] *Reg.*, n. 8.

[19] N. 11.

a mere passive participant in these practices, or if not guiltless, is sincerely penitent and promises to abstain from them in the future, is it permissible [20] to submit the matter to the judgment of the Sacred Congregation. These conditions, quite obviously, do not contemplate the case where contraceptive devices have been used either to eject or sterilize the *semen*, for since in these instances, a *penetratio cum seminatione* has taken place, the marriage must be considered consummated. Again, while the employment of an artificial covering may prevent a semination and thus frustrate the consummation of marriage, it is the usual policy of the Sacred Congregation, as practical experience shows, either because of the difficulty of establishing proper proof or for other reasons, not to grant the dispensation where a penetration of this sort has occurred. Hence, in practice, instances where onanism has taken place in which favorable action on the dispensation may be anticipated, are limited to those in which no penetration at all has been verified.

IV

The Faculty to Instruct the Process

The faculty to instruct the process for the dispensation *super rato et non consummato* is usually delegated to the local Ordinary upon his request in each individual case. In certain instances [21] the law itself confers this delegation upon the Ordinary. The first instance contemplates a case instructed in the usual way for nullity *ex capite impotentiae*, in which the acts fail to establish the existence of the impediment as a cause for nullity but seem to show that the marriage has not been consummated. The second instance regards a process unsuccessfully instituted on the basis of alleged nullity for some other impediment (ex. gr. lack of consent, force and fear etc.), incidental to which process the likelihood of non-consummation has been revealed. In these instances the acts, accompanied by the formal petition for the dispensation signed by one or both parties, and completed where necessary according to the norms laid down in the *Regulae*, may be sent directly to Rome. The question arises whether in the above mentioned cases we should await the formal conclusion and sentence in the process for alleged nullity before making use of the faculty to continue the case *pro dispensatione*

[20] *Reg.*, n. 11, § 2.

[21] Canon 1963, § 2; *Reg.*, nn. 3-4.

super rato. Since the stated conditions may be found fulfilled, even before the process has been completed, particularly where the impediment of impotence is involved (v. g. after the report of the medical experts has been received), there seems no reason why the process for alleged nullity should not be interrupted at that point and the case continued for the dispensation.

Normally speaking, in cases where nullity is alleged even though it be contended that the marriage has not been in fact consummated, the process for nullity, where practicable, should be preferred, since there seems little logic in seeking a dispensation from a bond which, as contended, is non-existent. This explains why the Sacred Congregation, when petitions in cases of this type are presented, often returns them to the diocese with the instruction that the process for nullity be employed. Moreover, the latter process will often prove in practice to be a surer and more expeditious one. There are times, however, when, because of the special circumstances of the case, the employment of this process becomes impracticable, as, for example, when the man whose impotence is alleged as the cause of nullity refuses to cooperate, or where the circumstances indicate that his alleged impotence is functional rather than organic in character. When these conditions are verified, the process for the dispensation furnishes the only practical remedy, and if they are stated at the time the faculty is sought, it will be readily granted.

V

Jurata Confessio Conjugum

The purpose of the process is, as has been said, to establish with moral certitude the truth of the facts alleged for the dispensation. The first of the proofs or *argumenta* employed in the investigation, as listed in the *Regulae*,[22] is the *jurata confessio conjugum*, that is to say, the sworn deposition of the parties attesting the truth of these facts. This *jurata confessio conjugum* is the chief and fundamental proof upon which the process rests, all the other proofs—including the so-called *argumentum physicum*, derived from the corporal examination performed by the experts of the court—being only confirmatory or corroborative in character, designed to support the allegations of the parties concerned. Hence it follows that since the testimony of the parties under oath before the court occupies an

[22] N. 20.

all-important place in the process itself, every care should be taken to make this testimony clear, definite and complete.

In the formulary of the appendix to the *Regulae* [23] will be found a list of questions (to be varied and supplemented according to the requirements of each individual case), designed to bring out clearly the various pertinent circumstances preceding, accompanying, and following the celebration of marriage, as well as the intimate details of the conjugal life that ensued. The purpose of these questions is to reveal whether the allegations of the parties are borne out by the circumstances. At the same time the answers made form the basis for the interrogation of the various witnesses to be heard and furnish the groundwork for the employment of the *presumptiones et indicia* described in the *Regulae*,[24] that is to say, the *argumentum ex adminiculis*.

One of the more important points to which the questioning is directed is that relating to the fact of non-consummation. Besides the direct question regarding this fact and the causes which may explain it, others are proposed with the view of evaluating properly the replies of the parties on this point. It goes without saying that the answers on these points should be complete.

Where the answers reveal that serious efforts were made to consummate the marriage, the person interrogated should be requested to describe as accurately as possible the nature of these efforts. The purpose of this questioning is to discover whether any penetration has occurred, for upon this the entire problem of non-consummation may depend. Hence the inquiry should be pursued up to the point where it becomes clear that no penetration, not even a partial one, has taken place. In the case of the *oratrix* the matter involved makes the questioning a very delicate one, but the resourcefulness of the court will usually succeed through a prudent and tactful approach to the subject in bringing out the desired information. As long as the nature of these efforts remains unexplained in the acts, it will not be clear whether the marriage is unconsummated, as alleged, or not. It is, in fact, because of the vagueness often found in the deposition of the *oratrix* on this point that the Sacred Congregation so frequently returns the acts with the instruction: "Invitanda est oratrix ut accurate describat naturam

[23] No. XIX.

[24] Chap. XII.

conatuum et ut diserte dicat an quaevis penetratio cum seminatione in vaginam excludenda sit."

Apart from the questions addressed to the parties regarding the precise cause on account of which the marriage remained unconsummated, and the steps taken to remove this cause (all of which quite obviously form an important part in the oral examination), the possible manifestation by them to others, *tempore non suspecto*, of their failure or inability to exercise conjugal relations becomes a very useful element in establishing the existence of *de scientia* witnesses [25] through whom an important corroboration of the petitioner's statements can be secured. Hence when the oral examination discloses the existence of these confidences, the parties should always be asked to state when and to whom and under what circumstances they were given.[26]

When, as occasionally happens, the testimony of one party appears to be in conflict with that of the others on important points, especially those connected with the intimate details of their married life, every effort should be made to clear up these discrepancies. For this purpose the assertions of one party may be disclosed, if need be, to the other, and either or both may be recalled for re-examination.[27]

Finally, in order better to estimate the danger of collusion, the *Regulae* [28] require that the petitioner should always be interrogated, unless the fact is otherwise known, concerning the time and person from whom the knowledge of the possibility of the dispensation was derived.

VI

Testimonium Septimae Manus

While the fundamental proof upon which the process rests is, as has been said, that found in the assertions of the parties themselves, these assertions must be confirmed and corroborated before they acquire full juridical value. Hence the requirement that the religious and moral character of the parties as well as their credibility be established not only through testimonial letters from their pas-

[25] *Reg.*, n. 60, § 2.

[26] *Reg.*, n. 42; Canon 1774.

[27] *Reg.*, n. 55, § 1, § 2, § 3.

[28] *Reg.*, n. 54.

tors or religious directors, but by *"septimae manus"* witnesses, that is to say, by witnesses of credibility, in number preferably seven, presented by each party.[29]

The *"probatio per testes septimae manus"* is a long-established practice in matrimonial cases where impotence or lack of consummation is involved,[30] and the employment of these witnesses is an invaluable aid in any investigation that concerns itself with the intimate domestic relations prevailing in marriage. One can readily see the wisdom of choosing these witnesses, as the various instructions on the subject prescribe,[31] from the close relatives of the parties or at least from close friends and neighbors who have known them intimately. Only they, in fact, who are linked to the parties by ties of close family association and affection may be presumed to be familiar with the circumstances of their conjugal life and thus to be in a favorable position to give testimony about these details. For this reason, besides attesting the general credibility of the parties, they are able to describe the significant facts surrounding their married life. And it is thus when we find substantial harmony in the accounts of these facts given by the relatives of both sides that we are enabled better to evaluate the testimony given by the parties themselves and obtain that confirmation which is desired.[32]

But even if it should develop that the family associates of the parties are unfamiliar with the relevant facts of their married life as narrated by the parties, their negative testimony in this respect will still be valuable in furnishing the basis for the employment of useful presumptions and inferences. Again, too, it is more probable, normally speaking, that those within the intimate family circle will have received the confidences of the parties and thus will be likely to contribute a valuable element of proof to the case.

Business associates and others, on the other hand, though competent, perhaps, to testify to the general credibility of the parties will usually be uninformed about the intimacies of their domestic life and hence prove less valuable as witnesses. For these reasons,

[29] *Reg.*, n. 59.

[30] Cf. Lega, *De Judiciis*, IV, n. 460 sqq.

[31] *Reg.*, n. 58; Canon 1975, § 1; cc. 5, 7, X, *de frigidis et maleficiatis, et impotentia coeundi*, IV, 15; instr. S. C. C., (22 aug. 1840)—*Coll. S. C. Prop. Fide*, I, n. 911; instr. *S. C. S. Off.* (1858)— *Coll. S. C. Prop. Fide*, I, n. 1153; *Fontes*, n. 4842.

[32] *Reg.*, n. 60, § 1; Canon 1975, § 2.

therefore, the *septimae manus* witnesses presented to attest the credibility of the parties should be chosen preferably from their close relatives and intimates.

This does not imply, however, that witnesses informed about the merits of the case, as, for instance, physicians consulted or others with whom the parties had discussed their marital difficulties, should not be heard. These who belong rather to the category of *de scientia*, or informed, as distinct from credibility witnesses, should likewise be included in the list of the *septimae manus* [33] and, if not included, should be cited *ex officio*.[34]

When in the case of a *pars conventa* who is *contumax*, witnesses *ex officio* are sought to testify, the same reasons already stated indicate why it is desirable that these be chosen, where possible, from the ranks of relatives and family associates rather than from casual friends and acquaintances.

Since the value of confidences given or information imparted is much greater when it is disinterested, that is to say, when it has been in no way inspired or colored by any thought of selfish interest or advantage, one can well understand why the *Regulae* [35] insist so strongly that witnesses, who possess useful information bearing upon the fact of non-consummation should always be asked *unde, quomodo,* and *quando* they received this information. Certainly the assertions of the parties are more apt to be reliable when confirmed by revelations made to others, *tempore non suspecto*, that is to say, at a time when there existed no apparent motive for not disclosing the full facts.

VII

The Argumentum Physicum

While it remains true, as has been said, that the fundamental argument in the process is the moral one consisting in the assertions of the parties, it is equally true that, in instances where these have actually lived together after marriage, the strongest confirmatory proof is to be found in the physical argument derived from the medical examination of the wife conducted by the experts appointed

[33] These would be the "alioquin de re edocti" referred to in *Reg.*, n. 68; cf. Canon 1975, § 1.

[34] *Reg.*, n. 71, § 2.

[35] N. 70; cf. etiam *Reg.*, n. 42; Canon 1774.

for that purpose by the court. When this proof is clear and definite, it is no exaggeration to say that it is conclusive in character. So important a role does it play in establishing the fact of non-consummation that the *Regulae* [36] prescribe that it should never be omitted except in the obvious cases where its employment would be useless.

The experts appointed to conduct the examination should of course be experienced and qualified not only professionally but morally,[37] and well acquainted moreover with the canonical concept of consummation. In many instances the evidences of physical integrity are so apparent that their presence can be readily recognized through the use of established tests by any practising physician. Many other cases, however, are often found in which, because of the peculiar difficulties involved, only the special skill of the gynecologist is competent to pronounce a definite judgment. For this reason it will be found more advisable where possible to select as experts specialists in this field rather than general practitioners.

That the report of the experts achieve its full value in the case, it should contain a clear description of the pertinent facts revealed by the examination as well as a statement, with their reasons, of the conclusions to be drawn from these facts. Again, since the purpose of the examination is to disclose whether the specific marriage under consideration has been consummated, it is well that the experts, before pronouncing judgment, possess full information about the facts in the case. This is particularly true where the acts reveal the existence of serious efforts to consummate or suggest that the state of physical integrity may have been impaired by conditions not directly connected with the marriage.

If during the course of the examination the experts, as is the usual practice, encourage the woman to recount the pertinent facts concerning the intimate details of conjugal relations or experiences which may have affected the condition of physical integrity, they will be in a better position to pass judgment upon the merits of the specific case under discussion. Otherwise, at their oral examination this information, if it exist, should be furnished them before seeking their final judgment on the merits of the case.

It occasionally happens that the report of the experts reveals an impairment of physical integrity attributable to factors other than

[36] N. 64.

[37] *Reg.*, n. 87.

conjugal relations. If the acts contain no explanation that may account for this impairment, the wife, if it be deemed prudent, should be summoned for re-examination on this point and her replies submitted to the judgment of the experts at their oral examination.

Differences, even seeming contradictions at times, may be noted in the reports of the experts. Often these differences are more apparent than real, explainable through a difference in emphasis on the various elements involved or even in the form of language used. In any event the court should seek to clear up any important contradictions that appear to exist by direct questions proposed to the experts during their oral examination, submitting, if necessary, for that purpose to each expert the report of the other.[38] If a real contradiction in substance, having an important bearing on the fact of consummation, be found to exist between the experts, the aid of a *peritior* or third expert may be invoked,[39] it being of great importance that any existing contradictions of this type be eliminated.

The examination of the man can often prove an important factor in determining the fact of non-consummation. The *Regulae*[40] insist that this examination take place in all instances where the lack of consummation is charged to the impotence of the husband, and the results of the wife's examination, on the other hand, have been inconclusive. When the examination of both is conducted by the same experts they are often better able, having due regard to the anatomical conditions and physical proportions encountered, to give a definitive judgment.

Finally, to insure the proper identification of the persons examined the norms laid down by the Sacred Congregation (March 29, 1929) should be scrupulously observed.

VIII

The Final Review of the Acts

Before the final conclusion of the process, the acts should be reviewed by the Judge as well as by the Defender of the Bond to discover whether the proofs are as complete as possible, that is, whether there exist any obscurities, contradictions, inconsistencies or omissions which can still be remedied.

[38] *Reg.*, n. 93, § 2.

[39] *Reg.*, n. 93, § 2.

[40] N. 84, § 2.

Since the acts have been prepared with the intention of being submitted to the Sacred Congregation for consideration and judgment, the Judge and Defender of the Bond should conduct the work of this final review with that thought in mind. They should, accordingly, regard the acts with a certain sense of detachment as if they were reviewing them as strangers for the first time, unfamiliar with those details of persons and fact gained through the course of the oral hearings which often make significant, to those participating in the hearings themselves, the written record which to others, deprived of this advantage, remains perhaps obscure. This work of final review of the acts as a whole is thus a very important one, often disclosing the existence of gaps and conflicts in the testimony as well as a lack of clearness on important points, particularly in the dispositions of the parties and experts, or other defects which may have escaped the attention of the court at the time the individual hearings took place.

Where these exist, proper measures suited to the requirements of each case should be taken to remedy them, or at least, the acts should show that the court was conscious of these defects and had adopted every reasonable means to remedy them. It is important, too, that this final review be directed to the procedure or form of the process, and where it reveals the existence of any irregularities or deviations from the form prescribed by the *Regulae*, it should be examined whether the motives or reasons of these irregularities have been properly recorded in the acts.

* * * * * * *

In transmitting the acts to Rome the parts that appear in English should be translated into one of the languages (Latin, French, and Italian) accepted by the S. Congregation.[41] To obviate difficulties which may arise it will be found useful to include with this translation an authentic copy of the original acts.[42] Finally, it will be well to make sure that with the acts are sent authentic copies of divorce decrees and, if obtainable, divorce proceedings; testimonial letters of the parties, experts and witnesses; physicians' certificates etc.

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[41] *Reg.*, n. 49.

[42] It appears to be the present policy of the S. Congregation, as recent letters transmitting faculties to instruct the process reveal, to require the sending of a copy of the original acts.

A CANONICAL THEORY OF CATHOLIC ACTION

Catholic Action is defined as a participation of the laity in the apostolate of the hierarchy.[1] Both "laity" and "hierarchy" are juridical concepts though the term itself, "Catholic Action", is conspicuously absent from the Code of Canon Law. Therefore there is a current need to examine this lay apostolate in the light of canonical principles.

What is the apostolate of the hierarchy? In what phase of the hierarchical apostolate may the laity participate? To what extent is this participation permitted by law? These questions find definite answers in the Code.

I. The Hierarchy of the Church[2]

The ecclesiastical hierarchy *objectively* considered is that power conferred by Christ upon the Apostles and their legitimate successors of governing the Church and administering the sacred mysteries of Christian Faith. *Subjectively* considered, the hierarchy denotes the subjects in whom this power is invested.

Christ conferred upon His Church a twofold power or hierarchy:

1—Hierarchy of Orders
2—Hierarchy of Jurisdiction

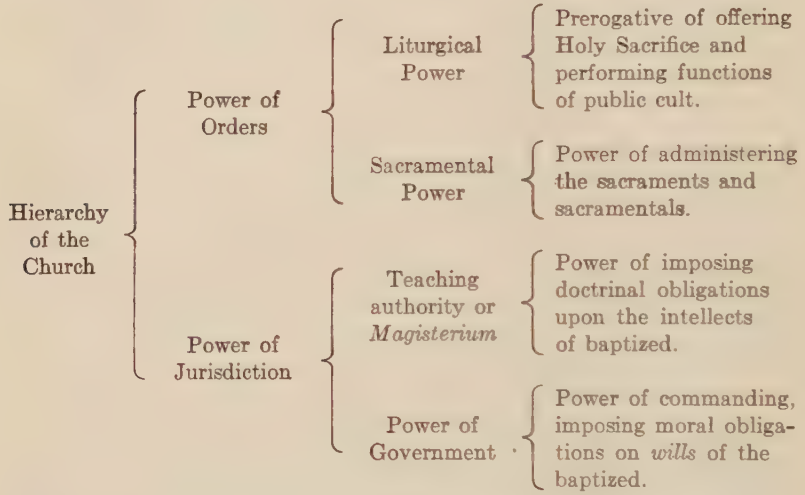
The *Hierarchy of Orders* (objectively considered) is that ecclesiastical power established for rendering divine cult and procuring the sanctification of mankind. The principal means by which this power is exercised are the Holy Sacrifice of the Mass, the sacraments and the sacramentals. This sacred power is conferred through rites called *orders*. Once conferred, this power may be validly exercised always and everywhere. The *Hierarchy of Jurisdiction* is that ecclesiastical power of authoritative direction over the baptized in view of their sanctification and eternal Beatitude. This power is conferred not through rites but through a commission of competent authority (*missio canonica*). The power of jurisdiction is

[1] Pius XI, litt. encycl. "*Ad Catholici sacerdotii fastigium*" 20 dec., 1935—*AAS*, XXVIII (1936), 46; Civardi, *L'Action Catholique*, Bruxelles, 1934) pp. 23-33; Ottaviani, *Institutiones Juris Publici*, (2 vols., Typis Vaticanis, 1935) II, n. 423.

[2] Wernz-Vidal, *Ius Canonicum*, (7 tom. in 8 vols., Romae, 1923-1938) II, n. 47.

twofold; it contains the *Power of Government* (*potestas regiminis*) and the *Magisterial Power* (*potestas magisterii*). The governmental power and the *magisterium* are species of a common genus, the power of jurisdiction. Both species are jurisdictional because both impose obligations; the governmental power on the will (*in agendo*); the magisterial authority upon the mind (*in credendo*).

The following schema aptly illustrates the interrelation of hierarchical powers.



Thus the divine constitution of the Church embraces two distinct powers, the power of orders and the power of jurisdiction.[3] Though distinct, these powers are intimately connected. According to the present legislation, only those constituted in orders are capable of participating in the power of jurisdiction.[4] Moreover, the power of orders, at least for its licit exercise, is subject to the power of jurisdiction. Finally, both are usually found in the same subjects, viz., the Roman Pontiff and the Bishops.

The laity are excluded from any direct sanctifying action since the objective means of sanctification — liturgical and sacramental power — are exclusively in the hands of the clergy. The laity are likewise excluded from the government of the Church since they

[3] Canon 118.

[4] Canon 109, 147, § 2.

are incapable of receiving jurisdiction.[5] There remains, therefore, but the work of the magisterium in which the laity may have a part.

II. Catholic Action and the Magisterium

The *Magisterium* of the Church is that species of the jurisdictional power ordained to the *propagation, preservation* and *defense* of the Catholic Faith and exercised especially by the imposition of precepts of faith within the competence of individual prelates.[6] The end or object of the *Magisterium* is, therefore, threefold:

1—the *propagation* of the faith
2—the *preservation* of the faith
3—the *defense* of the faith

To attain this triple objective effectively the Church has at her command manifold means. First in order of importance comes the *infallibility* of the Roman Pontiff with which truths of faith are defined and errors proscribed.[7] The next efficacious means at the command of the Church is *oral preaching* which is carried on by means of *catechetical instruction, sermons and missions* (exterior and interior).[8] The object of the teaching office of the Church is also promoted through *seminaries* in which priests are formed for the work of the apostolate, through *schools*, primary and secondary, wherein the young are moulded in Christian faith and morals and finally through the *press* which in modern times has become so powerful an instrument for the propagation of doctrine.[9] Another powerful and timely means of promoting the objectives of the *magisterium* is Catholic Action.

That the work of Catholic Action is identified with the magisterial office seems undeniable. The objective of Catholic Action is: "fidei doctrinaeque christianae principia cum late disseminanda, tuenda, tum denique privatim publiceque promovenda."[10]

[5] C. 10, X, *de constitutionibus*, I, 2.

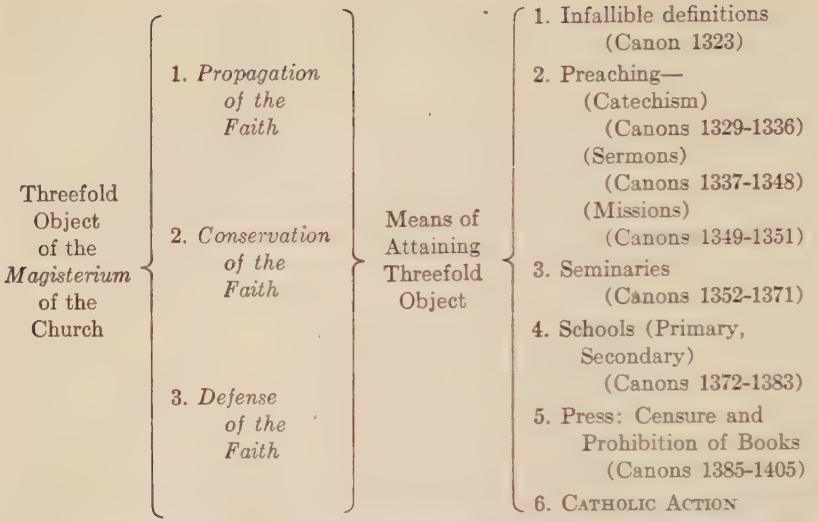
[6] Wernz-Vidal, *op. cit.*, IV, n. 614, sqq; A Coronata, *Institutiones Juris Canonici*, (5 vol., Taurini, 1928-1936) II, n. 907.

[7] Canon 1323.

[8] Canons 1327-1351.

[9] Canons 1352-1383.

[10] Ottaviani, *op. cit.*, II, n. 423; Litterae ad Card. Bertram, Pius XI—*AAS* XX (1928), 353.



"Disseminanda", "tuenda", "promovenda" are, all three, objectives of the magisterium of the Church. In his "*Ubi Arcano Dei*", Pius XI tells the clergy: "Recall to the minds of the faithful that when they are taking part in your work and that of your clergy in *carrying abroad the knowledge of Christ* and *teaching* the lesson of *love of him publicly* and *privately* [*in provehenda Christi cognitione et amore publice privatim*] they are indeed worthy of being hailed as a 'chosen generation', a 'kingly priesthood', a 'holy nation', a 'purchased people' (I Pet. II, 9); then indeed they will be closely united with us in *propagating* and installing the kingdom of Christ by their effort and zeal . . . [*et ipsi Nobiscum . . . coniuncti, Christi regno sua industria et nativitate propagando et instaurando*]."[11] The expressions, "provehenda Christi cognitione" and "Christi regno . . . propagando" indicate likewise functions pertaining to the magisterial office of the Church. It is undeniable that the faithful can take *indirect* part in the work of sanctification, but it would seem that the *primary* and *direct* object of Catholic Action is identified with that of the *magisterium* of the Church. This opinion seems corroborated by Father Tromp who says the Catholic Action, "re juridice considerata est pars officii summi pastoralis."[12]

[11] Pius XI, litt. encycl. "*Ubi Arcano Dei*", 23 dec. 1922—*AAS*, XIV, (1922) 695. Italics inserted.

[12] Tromp, *Actio Catholica in Corpore Christi*, (Romae, 1936) 27.

III. The Participation of the Laity in the Magisterium of the Church

The Church of Christ Jesus has been exclusively commissioned to preach the gospel to all creatures. For this reason the Church, and the Church alone, has the right and the duty of teaching all nations, and in the execution of this divine mandate she is independent of any and all secular authority.[13]

As we have already seen, the *magisterium* of the Church is an element of the Hierarchy of Jurisdiction. Since then, the laity are incapable of participating in the jurisdiction of the Church, it follows that they cannot, at least from a fundamental principle of Church law, receive a jurisdictional office of teaching evangelical truth. However, the office of preaching does not always involve the exercise of jurisdiction. The parish priest (*parochus*), for instance, enjoys no ordinary jurisdiction in the external forum and yet it is part of his office to preach and expound Christian Doctrine.[14] Therefore because the laity are incapable of receiving jurisdiction in the Church, it does not follow that they are incapable of being invested with the office of preaching.

Although the Church has always denied the faithful the office of preaching, strictly so called,[15] this does not mean that she desires to exclude the laity from participating in the work of communicating Christian truth. On the contrary, the Church more than once has entreated the laity to take an active part in this work.[16] The Code imposes the obligation upon pastors of recruiting pious lay people for the work of catechizing whenever necessary.[17] Lay assistance is especially necessary in modern times because, 1) the number of the clergy is insufficient, 2) the action of the clergy is frequently ineffective due to the evil influence of widespread laicism, and 3) the vastness of the enterprise of christianizing society surpasses the means in the hands of the clergy.[18] Precisely because

[13] Canon 1322; Leo XIII, ep. encycl. "*Immortale Dei*", 1 nov. 1885—*ASS*, XVIII (1885), 174; *Fontes*, n. 592.

[14] Cappello, *Summa Juris Canonici*, (3 vols., Romae 1932-1936) II, n. 519.

[15] C. 12, X, *de haereticis*, V, 7.

[16] Leo XIII, litt. encycl. "*Sapientiae*", 10 jan. 1890—*ASS*, XXII (1889-1890), 391; *Fontes*, n. 605. Pius XI, litt. encycl. "*Ubi Arcano Dei*", 23 dec. 1922—*AAS*, XV (1923), 22.

[17] Canon 1333, § 1.

[18] Civardi, *op. cit.*, p. 176.

the clergy need the assistance of the laity in the work of propagating Christian truth, the Roman Pontiffs have launched the great lay crusade of *Catholic Action.*[19]

It is unquestionable that the laity can and should take part in the propagation of Christian doctrine, especially those "quibus ingenii facultatem Deus cum studio bene merendi dedit."[20] However when the laity undertake this work of communicating Christian truth, they are not to teach as *authoritative interpreters* of Christian revelation ("non sane doctoris sibi partes assumere") but rather as agents reaffirming and propagating what they themselves have heard from their divinely appointed teachers; they are merely to re-echo the voice of the Pontiff and Bishops ("magistrorum voci resonantes tamquam imago").[21] Such is the sphere within which the laity can participate in the mandate of the magisterial office.

The Code further circumscribes the apostolic activities of the laity. Canon 1342, 2, prohibits the laity from preaching within the Church (*in ecclesia*). This prohibition extends even to lay religious. The canon prohibits the exercise of the preaching function "in ecclesia", that is, only in "locus sacer ad cultum Dei publicum destinatus omnibus fidelium patens."[22] Since public chapels (*oratoria publica*) are governed by the same laws as the church,[23] it follows that laymen are likewise forbidden to preach in public oratories.[24] They are not prohibited, however, by virtue of this canon from preaching in other places, such as semi-public and private oratories.[25]

The apostolic activity of the laity is again limited by Canon 1325, 3, which prohibits them from taking part in *especially* public (*publicas praesertim*) disputations and conferences with *non-catholics* without the permission of the Holy See or in urgent cases, the

[19] *L'Action Catholique, Textes Pontificaux, Classés et Commentés*, Abbé E. Guerry, (Paris, Desclée, 1936) n. 31.

[20] Leo XIII, litt. encycl. "*Sapientiae*", *loc. cit.*

[21] *Ibid.*

[22] A Coronata, *op. cit.*, II, n. 677.

[23] Canon 1191, § 1.

[24] Vermeersch-Creusen, *Epitome Juris Canonici*, (3 tom., Mechliniae, 1933) II, n. 677.

[25] Vermeersch-Creusen, *loc. cit.*; A Coronata, *loc. cit.*; Ayrhinac, *Administrative Legislation in the New Code of Canon Law*, (New York: Longmans, Green and Co., 1930) n. 182.

permission of the Ordinary of the diocese. The canon refers primarily to public disputations and conferences but includes those private as well. "The law has in view formal debates or disputations on controverted subjects arranged beforehand, not simple discussions which may arise in the course of a conversation, nor informal conferences which two persons may have privately on religious matters, nor apologetic conferences with liberty left to hearers to present objections." [26] The scheduled type of disputation even with socialists and communists accustomed to attack the dogmas of the Church would seem to come under the prohibition.[27] Leo XIII, in a letter to the Apostolic Delegate of the United States, September 18, 1895, advised Catholics to take part *no* longer in religious parliaments and congresses, composed of representatives of various cults, but rather to have their own congresses for the discussion of religious problems which others might attend.

Canon 1328 enunciates the principle that no one may exercise the ministry of preaching unless he has received, from a legitimate superior, the *canonical mission* to this effect (*nisi a legitimo superiore missionem receperit*) or has received an office in the Church to which this function is attached by law. This is a general principle already *authentically* declared by the Council of Trent.[28] Therefore the function of preaching presupposes the *missio canonica*. This *missio canonica* consists in an act of ecclesiastical authority by which one is *commissioned* and *approved* for the exercise of this ministry.[29]

A distinction must be made in the manner of teaching Christian truth. This function can be performed *privately* or *publicly*. When Christian doctrine is taught privately (such as was done by the merchants of the early centuries) no positive commission (*missio canonica*) is required.[30] When lay men and women teach Christian Doctrine in schools or as catechists in parish classes, they are teaching in a *private capacity*.[31] Hence they do not need the *missio canonica* from the local Ordinary. However, it is within the author-

[26] Ayrhinac, *op. cit.*, n. 165; Canon 1325, § 3.

[27] A Coronata, *op. cit.*, II, n. 912; Augustine, *A Commentary on the New Code of Canon Law"*, (8 vols., St. Louis, 1925-1931) VI, 336.

[28] *Ecclesiastical Review*, XIII (1895), 395.

[29] Conc. Trident., Sess. XXIII, *de ordine*, c. 7.

[30] Wernz-Vidal, *op. cit.*, IV, n. 623.

[31] *Ibid.*

ity of the Ordinary to require lay people about to engage in such work to pass an examination in order to determine their aptitude. Such a previous examination and approbation would seem necessary both from canon 1336 and from a recent decree of the Holy See.[32] Wherefore it would seem that whenever the laity are to engage in the work of teaching Christian Doctrine—even in a private capacity—*they need the approbation of the local Ordinary.*

May the laity then teach Christian Doctrine in a public capacity? It is clear that they cannot, at least from common law, be invested with a jurisdictional office of preaching. But can they be commissioned to teach in a *public capacity* such as a pastor but outside of churches? Leo XIII in the above quoted passage does not distinguish between public and private capacity.[33] Pius XI, moreover, would seem to imply that the laity are capable of being commissioned to teach *publicly.* "Illud porro in christifidelium mentes revocate, quod cum ii . . . in provehenda Christi cognitione . . . *publice privatim. . . .*" [34] A Coronata takes it for granted that the laity may teach publicly but denies that such a function performed by the laity can be called "preaching" (*concio*).[35] Vermeersch says, "Minus impeditur contio laici in alio loco; v. g. novicii in oratorio semi-publico noviciatus." [36] The II Council of Baltimore decreed that the laity were forbidden to preach in churches without permission of the local Ordinary.[37] From this it would seem that the mind of the Fathers of this plenary council was that with the permission of the Ordinary they might teach publicly in churches. At least they were far from denying them capacity of being commissioned to *teach publicly.* Whether we call it "preaching" or not, it seems quite evident that the laity are capable of being commissioned to teach Christian Doctrine publicly.

The laity may not assume the office of public exposition of Christian Doctrine on their own private authority. They must be com-

[32] S. C. de Religiosis, instr., 25 nov. 1929. *AAS.* XXII (1930), 28, 29; Jansen, *Canonical Provision for Catechetical Instruction,* (The Catholic University of America, Canon Law Studies, n. 107: Washington, D. C., 1934) p. 44.

[33] Leo XIII, litt. encycl. "*Sapientiae*".

[34] Pius XI, litt. encycl. "*Ubi Arcano Dei*".

[35] A Coronata, *op. cit.*, II, n. 926.

[36] Vermeersch-Creusen, *op. cit.*, II, n. 677.

[37] *Acta et Decreta Concilii Plenarii Baltimorensis Secundi,* (2. ed., Baltimore, Murphy, 1894) n. 194.

missioned by competent ecclesiastical authority; they must obtain first of all the " missio canonica ".[38]

When we speak, therefore, of the laity participating in the apostolate of the hierarchy, it would seem that this participation is primarily in the magisterial mission of the hierarchy, even to the extent of speaking publicly, but not in churches or public oratories. Since to participate in is not to take over completely, even here the activity of the laity is limited by law.

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[38] Wernz-Vidal, *op. cit.*, IV, n. 633.

THE OUTLAWING OF SUITS

The subject of this paper might well be described by a variety of titles: namely, the Statute of Limitations in Civil Law, the Outlawing of Suits or Prescription in Canon Law. To understand its exact meaning and scope it is well to recall that in every legal suit one party has availed himself of the services of the Public Authority to vindicate, retain, reclaim his right as granted to him under the law and which is now controverted. This faculty of appeal to the Public Authority is called an action, and it is this action which is primarily involved in the outlawing of suits. The latter legal procedure means that this public defense of one's right is denied. This denial may be direct: the law may recognize that the right exists in the subject under the law but its defense will not be undertaken. The denial may be indirect: through prescription, through the peaceful possession by the passive subject for a determined number of years the right may be made exstinct in the active subject and consequently the defense of that right is no longer obtainable—that which no longer exists cannot be defended. We may then propose the definition of the outlawing of suits as a legal statute determining the time limit within which Public Authority may be invoked for the vindication, enforcement, protection of a legal right; once this time limit has passed, the Law will refuse to change the legal status as established by peaceful possession through the mere lapse of time.

Can this suppression of legal rights, this denial of public protection of the Law be justified? One can hardly refuse this faculty to the Legislator. He must procure the Common Good in the most

effective manner. This is usually accomplished by the granting and the sanctioning of individual rights, but exceptionally the same goal cannot be reached unless by the denial of such rights. Whenever rights granted by the Society work to the harm of Society, they must no longer be maintained. This is the basis of the outlawing of suits: the furtherance of the general welfare as superior to the private welfare of the citizens. Legalists reason that the function of Society is the promotion of Justice for all. With the passage of time when witnesses may have died, when books and papers very relevant to the disputed right may have been destroyed or lost, when recollection of past events may have become difficult and dim, the administration of Justice is rendered very hazardous if not impossible. To avoid contravening its principal goal, Society would prefer to recognize the *status quo* and desist from all change. It would permit the actual possessor to retain his rights in the case. Even if the above reasons are not verified in a particular case, the Law is applied to effect a salutary punishment for negligence on the part of the individual and to enhance the Common Good by stimulating greater vigilance on the part of the subjects as to the safeguarding of their rights under the law. This is the reasoning of civil and ecclesiastical legislators.[1]

I. Contentious Litigation

The outlawing of suits has never been unknown in legal procedure. Scholars show that the Hebrews, the Greeks and the other early peoples of culture had similar statutes. Roman Law soon introduced it into its masterful Code. At first, every right had the ever enduring protection of the Roman Empire, but when the *Jus Honorarium* was inaugurated with its temporary tenure of the magistrature, then all rights granted by these magistrates were deemed valid only during their term of office. Furthermore, when Prescription was enacted as a legal means of acquiring property rights, there was of necessity a limitation of the legal protection of property rights. Finally, thirty years became the maximum period granted for the regaining of rights which had fallen into the

[1] Cf. Digest 41, 3; 44, 3. Howe: *Studies in Civil Law* (Boston, 1905), II, 266-267; Wood: *On Limitations* (Boston, 1901), pp. 3-10; Banning: *The Limitations of Actions* (London, 1877), pp. i sqq.; Roberti: *De Processibus* (Romae, 1922), pp. 424-429; Wernz-Vidal: *Ius Canonicum*, VI (Romae, 1927), pp. 310 sqq.; Wernz: *Ius Decretalium*, III (Romae, 1908), pp. 305 sqq.

possession of another person though unjustly and illegally.[2] English Law was influenced by Roman Law. The Church lent considerable prestige to Roman and Canon Law in the administration of Justice in English courts. It is asserted that the origin of Prescription in English law may be traced to the case of a freeman who had sold himself into perpetual servitude and who later wished to rescind the contract. There was nothing in English law to permit this action and little help could be given by other supplementary sources. At length Hebrew law was adduced by the Clerics as a legal precedent: it provided that in such cases the freeman should be considered as liberated from his contract on the seventh year of its fulfillment. Judges afterwards applied to all contracts of sale this ancient Hebrew statute.[3] Canon Law adopted the provisions of Roman Law, and this from its very infancy. The Law of Theodosius on Prescription given in 424 was promulgated for the Church in the Council of Chalcedon (451). Thereafter the development of Roman Law was received into Canon Law with due modification.[4] In present day Canon Law there are many statutes explicitly pertaining to Prescription and to the Outlawing of Suits; and whatever is not found in our Code as to the indirect outlawing of suits by the substantive law of Prescription is to be taken from the Civil Law of the Nation in which the case is to be adjudicated.

Before telling about the Outlawing of Suits, one should make mention of certain rights which can never be included under the law of Prescription or of the Outlawing of Suits. There are rights that cannot be usurped by others than their original possessors or lost by the latter because of negligence. Consequently these rights are never made exstinct nor is there any possibility of outlawing their defense.[5] In this category must be placed all rights which come from the Divine Law either positive or natural. An example of these would be the indissolubility of marriage. A marriage invalid originally because of a pre-existing bond could never deprive the first marriage of its indissolubility and thus acquire legitimate

[2] Wernz-Vidal, *ibid.*, 309; cf. Gaius, 4, 110, 111; cf. Poste, *Commentary on Gaius* (Oxford, 1894), pp. 545, 546; Buckland, *Elementary Principles of the Roman Private Law* (Cambridge, 1912), pp. 91, 92; Radin, *Handbook of Roman Law* (St. Paul, 1927), pp. 363, 364.

[3] Deut. 5: 12; Zane, *The Story of Law* (New York, 1928), pp. 234-236.

[4] C. 7, 39, 3; Wernz, *loc cit.*

[5] Canon 1509; Wernz-Vidal, *ibid.*, pp. 310, 311.

existence simply through the passage of a certain number of years. Again in this category will be found certain rights so protected by the positive will of the Legislator. They are as follows:

1. rights emanating from privileges accorded only by the Apostolic See;
2. spiritual rights whose exercise is reserved to the clerics cannot be acquired by the laity;
3. territorial limits of any ecclesiastical division which are established and beyond doubt as to the extent etc. cannot be prescribed;
4. Mass stipends, and Mass foundations cannot be made exstinct as to their obligations;
5. ecclesiastical benefices cannot be prescribed unless there is some title or other as a basis for possession;
6. the payment of the Cathedraticum;
7. the obligation of submitting to ecclesiastical visitation;
8. rights obtained through the pure bounty of the giver;
9. sacred things in possession of ecclesiastical moral persons may be prescribed only by other moral persons in the Church; if they are in possession of private persons they may be prescribed, but for sacred use only, by other private persons.

We must also make special mention of the rights which pertain to the personal status of individuals. These cannot be prescribed, their defense is permanent. By the term personal status is meant the ensemble of rights and obligations coming from a state of life which is had by all as permanent, set, immutable in character. These states are usually classed as the married, the religious, the clerical states. To these might be joined the facts of the birth, the baptism, and the death of the individual. These rights can never be acquired by the passage of a determined number of years, nor can the coexistent obligations be thus escaped, nor is there any time limit within which the Public Authority must be invoked for their defense. The reason for this is evident: these rights and obligations are of a social as well as of a personal nature and they intimately concern the Public Welfare; hence they must not be discarded or assumed without strict juridical procedure and caution. Even the Tridentine law concerning the five-year limit for the challenging of the validity of a religious profession no longer holds:

religious profession belongs to the category of personal status rights and obligations and has a permanent right of defense in the eyes of the Code.[6]

If we exclude the above rights all others fall under the law of prescription; and the rights themselves *directly* and *indirectly* their defense cease in the persons who loses them: once the conditions for prescription have been fulfilled any suit for reclaiming the lost right must be outlawed. The following conditions are required: [7]

(a) The right must be subject to prescription: we have noted above the ones which cannot be prescribed.

(b) The time limit must be integrally fulfilled. The time limit is determined in the Code for some rights; whenever the Code is silent on this matter, then recourse must be had to the Civil Code of the place of litigation. The following periods of time are established in the letter of the Code. Actions of persons who are of the personnel of the Holy See, or involving property rights in "res immobiles" or in things which are classed "pretiosa" by Canon Law belonging to the Holy See, are prescribed only after a period of one hundred years. The same rights belonging to any other ecclesiastical moral person may be defeated only by thirty years of peaceful possession.[8] In all other cases we must consult the Codes of Civil Law for the time limitations of substantive law and the consequent indirect outlawing of suits.

(c) Besides the lapse of time and the eligibility of the right to prescription, the other particular condition for prescription in Canon Law is that of good faith. This must be possessed by the one who prescribes. Contrary to most civil codes, Canon Law demands good faith not only in the beginning of the prescription but also during the entire period of the required time.[9] This requisite of good faith resolves itself into this: the beneficiary of this privilege of law must have the moral persuasion that he does no harm in appropriating to himself the respective right or in liberating himself from such an obligation. In the latter case of liberating one's self from an obligation, good faith may consist in a mere passivity—the advantage

[6] Sess. XXV, *de regularibus*, c. 19; Wernz-Vidal, *loc. cit.*

[7] Roberti, *ibid.*, pp. 424 sqq.; Wernz-Vidal, *ibid.*, p. 312; Lega, *De Judiciis Ecclesiasticis* (Romae, 1905), I, 269 sqq.

[8] Canon 1511.

[9] Canon 1512.

may accrue from the neglect on the part of the other person to enforce his claim, particularly in cases in which by law or by custom explicit requisition is looked upon as an essential act in the enforcement of one's right.

If all these conditions are fulfilled, the right involved passes to the one who has complied with the law; the right and its defense is no longer had by the original possessor. By the fact of the completion of the conditions set down as necessary for the prescribing of the right, any suit involving the former possession must be outlawed.

In the *direct* outlawing of suits (prescinding now from the indirect by means of prescription) the Code has determined the following time limits:

1. Rescissory actions arising from contracts in which one party because of mistake has suffered harm, amounting to more than one half of the price stipulated, may be demanded for two years from the date of the contract.[10]

2. The action for the retention of an object already in one's possession for one year may be pressed at any time during the year following the contesting of such possession against all but the person dispossessed covertly through theft, or through a loan.[11]

3. Any one who was covertly or by theft deprived of his property has the right to bring action for the reclaiming of possession for one year from the date that such spoliation came to his attention or his knowledge.[12]

4. The action for the obtaining of *restitutio in integrum* because of some evident injustice in a judicial sentence may be proposed for four years following the dating of such sentence or from the date that the interested party might have acted.[13]

5. Actions for the declaration of the nullity of a judicial sentence because of a formal defect may be proposed for three months from the date of the sentence if the defect is *sanabilis*, or for thirty years if the defect is *insanabilis*.[14]

[10] Canon 1684, § 2.

[11] Canons 1695, 1696.

[12] Canon 1698.

[13] Canon 1688.

[14] Canons 1893, 1895.

As regards the computation of the time, it is stipulated in Canon Law that the time begins to run its course from the very day that the claimant was free to propose his action. Personal actions run from the day of the violation of the right by the defendant.[15] This fulfillment of the time limit may be interrupted temporarily by the fact that one of the conditions necessary for prescription fails, or there may be a suspension of the time for prescription due to the fact that the party against whom one prescribes cannot possibly resist such action because of some impediment not of his own making.

II. Criminal Suits

The same theory of the outlawing of suits is also applicable in criminal suits. The right of the petitioner for the intervention of the Public Authority for the adjudication of a crime may be denied after a lapse of a determined number of years; it is also applicable to the exaction of the penalty once that the crime has been judged and the penalty given.

In refusing to convict or in refusing to carry out the sentence imposed because of the lapse of a certain time limit, does not the Church defeat the very purpose of criminal law? The answer to this query can be found in the philosophy which directs and permeates criminal procedure. Why does the Church punish? Some authors contend that the Church inflicts penalties simply to bring back the delinquent to God. Is it not possible then to envisage the case wherein the end, the conversion of the erring one, has been otherwise obtained and that the penal procedure is no longer necessary? Others hold that the reason for penalties is the reconciliation of the guilty one with the Society of the Church. If this is effected without penalties, why should they be applied? The third opinion, and the most worthy one in this matter, holds that the Church punishes primarily in self-defense, in vindication of its social authority against the delinquent, and only secondarily for the amendment of the offender. The maintaining of this authority is imperative for the good conduct of society. This last opinion explains well the different aspects of criminal and penal law. It explains the presence of *poenae vindicativae* in the Code: these are inflicted on the offender regardless of his amendment and run their course notwithstanding his return to better sentiments. This opinion also explains the penalties which sometimes replace censures after these have been taken away because of the repentance of the delinquent; they

[15] Canon 1705, § 1; Wernz-Vidal, *ibid.*, p. 313.

are in expiation of Society's claim on the individual. Ultimately, then, the inflicting and the expiation of penalties can be justified on the basis of self-defense for Society. Would it not be possible, then, to find an instance in which this self-defense would not be expedient? would indeed be harmful? If the harm done to Society by the crime has been healed through the passage of time and through the forgetfulness of man, and the delinquent has been fully reformed, why should Society defend itself? Added to this philosophical viewpoint, other reasons for limiting the opportunity of prosecuting crimes spring from the evident hardships to be encountered because of the remoteness of the source of proof either of guilt or of innocence. The Church would prefer to dismiss the case than to expose itself to the promotion of injustice.[16]

Canon Law lacked all explicit mention of prescription in criminal law until the year 1898. It is true that the Decretals did provide that Canon Law was to be supplemented by the Constitutions of the Emperors and did make passing mention, an allusion to the prescription of twenty years in Roman law. The Decretalists, however, disputed on this issue and the general conclusion was that no prescription was permitted for crimes prosecuted *ex officio* by the Church. The Sacred Congregation of Bishops and Regulars, enjoying competence from the beginning of the nineteenth century, never applied the Roman Law to criminal cases involving clerics, although it did speak and treat of accusations as "*antiquatas*" and "*sopitas*".[17] On March 22, 1898, the Sacred Congregation of Bishops and Regulars declared formally that Roman Law should be taken as the guide of Canonists in the outlawing of criminal suits. It was agreed, however, that the limitation was to be applied only upon the petition of the defendant himself and that it did not preclude the maintaining of the crime as an exception, or as an impediment to the obtaining of ecclesiastical offices and favors.[18]

Following this approval, canonists accepted the various time limits which had been in use amongst the jurisconsults. A maximum of twenty years was set for the punishment of most crimes. Punishment of those pertaining to detraction, calumny, and attempts

[16] Cf. Roberti: *De Delictis et Poenis* (Romae, 1938), pp. 246-249; Wernz-Vidal, *ibid.*, pp. 315-316.

[17] Roberti: *De Processu Contentioso* (Romae, 1922), p. 431; Lega: *De Poenis,* IV (Romae, 1907), 250 sqq.

[18] *ASS,* XXX (1897-1898), 677; Chelodi: *De Poenis* (Tridentini, 1933), pp. 160-162.

on the honor of one's name was to be outlawed at the end of one year. Five years was the limit for the punishment of serious crimes of the flesh instead of one year as in Roman Law. It was admitted finally that punishment for certain crimes could not be prescribed, and amongst them were placed abortion, sodomy, incest, heresy, apostasy, duelling, the passing of counterfeit money and crimes against the government. In these cases the harm done to Society was held as irremediable, ineffaceable.[19]

The present Code bears strongly the imprint of the legal tradition. There are still crimes punishment for which cannot be prescribed. Most of these belong to the jurisdiction of the Holy Office. Included are apostasy, heresy and solicitation in confession. Three years will outlaw punishment for the ordinary crime. To this general rule few are the exceptions. Punishment for crimes involving personal honor is prescribed one year from the date of commission. Calumny and detraction require the ordinary three years. Crimes of the flesh which are annotated as *qualificata* are prescribed in five years—these include not only a violation of the virtue of chastity but also the violation of some other virtue such as piety, justice etc. They would include sodomy, incest, adultery, rape, etc. Sins or crimes against the seventh precept of God and also involving a violation of the virtue of religion are unpunishable also only after five years. Simony in the strict sense of the term, whether against the ecclesiastical law or against the divine law, and homicide in the strict sense of the term are prescribed only after ten years.[20]

The time limit begins to run its course from the very day of the commission of the crime. Even occult crimes, namely those committed in such circumstances as shield their detection or divulgation are not excepted from this general rule.[21] True, a decision of the Sacred Congregation of Bishops and Regulars is adverse to this view and it would have the time begin from the day that the Public Authority gained knowledge of the crime.[22] The Code does not sanction this opinion today: the word of the Code is plainly contrary to it and the theory of prescription makes the opinion unten-

[19] Wernz: *Ius Decretalium,* V (Romae, 1914), 8.

[20] Canon 1703; Chelodi, *ibid.,* p. 161; Cocchi: *Commentarium in Codicem,* VII (Taurini, 1936), 179; Vermeersch-Creusen: *Epitome Juris Canonici* (Romae, 1936), III, 61.

[21] Canon 1705.

[22] Lublinen., 22 aug. 1896—cf. Lega, *loc. cit.*

able. Besides, authors of great authority explicitly include the occult crimes under the ordinary norm.[23]

In the matter of crimes which are fully perpetrated in their first act but in which the delinquent subsequently persists by partaking of and furthering their malice (for example, apostasy, concubinage) and those which consist of many acts successively performed but all emanating from the original act of the will (such as a theft planned and executed in small quantities), the time limit for prescription does not begin its course until the persistence of the offender in the crime has ceased, or until the last act has been performed.[24]

Even if the criminal action be outlawed, there still remains the right to sue for damages resulting from the crime; and the Bishop still retains the right to inflict the *remedia* of Canon 2222, § 2. For instance, these crimes now outlawed may be taken as an indication of the lack of idoneity or of fitness for certain offices.[25]

All that has been said so far is applicable to the outlawing of the fulfillment of the penalty once that the crime has been judged and the penalty determined. If the time limit pass before the penalty has been executed, regardless of the cause thereof, the penalty ceases to be enforceable. The only penalties which prove exceptions to this rule are those of the *latae sententiae* class. These need no intervention of the Public Authority and are immediately applied *ipso jure*. The declaratory sentence for such penalties may be prescribed but not the penalty itself or its immediate effects; these are independent of any declaratory sentence.[26]

The supreme goal of Society is the promotion of the Common Good, and this cannot be done without the strict observance of the precept of Justice. Nevertheless the rigor of Justice would sometimes work harm to the very cause that it is supposed to sustain, and further. Society then must lessen the rigor of Justice, and this is done in civil and criminal suits by the juridical institutions of Prescription and the outlawing of suits, both often concurring. The Society of the Church in its juridical organization approves of and uses these two institutions to further and enhance its quest of the salvation and the perfection of the spiritual in man.

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[23] Wernz-Vidal, *ibid.*, p. 316; Roberti, *De Processu Contentioso*, p. 432.

[24] Canon 1705, §§ 2, 3; Vermeersch-Creusen, *ibid.*, p. 62; Chelodi, *loc. cit.*

[25] Canon 1704, § 2.

[26] Roberti, *De Delictis et Poenis*, pp. 313-314; Vermeersch-Creusen, *loc. cit.*

BEQUESTS FOR MASSES

According to the divergent views of the courts of the various States a bequest for Masses may be:

1—a charitable trust;

a—valid (this is the more general view); adopted also by the American Law Institute, where the bequest is not made to a specified priest (cf. *Restatement of Trusts,* Tentative Draft No. 5, § 361));

b—invalid because the beneficiary is too indefinite to be sustained (this was once the view in New York, Wisconsin, and Minnesota);

2—a private trust, that is, a trust for the benefit of one or a few private persons; in this instance, for the repose of the soul of the decedent;

a—valid (this is the current view in Iowa);

b—invalid (this is the view in Alabama) on the ground that it offends against the laws on perpetuities or because there is no living beneficiary to enforce the trust;

3—not a trust, but when given to a specified priest, a valid gift to him (this is the view in Kansas, California, and Rhode Island; it was once held also in New York); this is the view of the American Law Institute in its Tentative Draft No. 5 of the *Restatement of Trusts,* § 361;

4—not a trust, but sustainable as funeral expenses (once held in the lower courts of New York and adopted in a decision in New Jersey in 1929).

One other opinion has been held, but not in the United States, viz., that such a bequest is a trust that fails because it is instituted for superstitious purposes.[1]

The question has been adjudicated in sixteen States. The consequence is that considerable doubt must remain as to the view the remaining States would take were such a bequest to be brought before their highest court for adjudication. This doubt remains in

[1] Cf. *Ecclesiastical Review,* LXXXVIII (1933), 170.

spite of any knowledge that might be possessed concerning the State's doctrine on charitable bequests in general, because it is possible that a bequest for Masses might be regarded as a private trust. If the court should view the bequest in this light, it is immediately beset with all the difficulties that can arise from the uncertainty of beneficiary, the inability of the beneficiary to enforce the trust, and the statute against perpetuities.

However, it is to be noted that in only two of the States where the question has been adjudicated has a bequest for Masses been regarded as a private trust; and in only one of these has it been deemed invalid. That State is Alabama, which, on the other hand, sustains in general indefinite charitable bequests. Iowa holds it to be a private trust, but valid.

In only three other of the States where the question has arisen has the validity of the bequest been questioned, and that was due to the peculiar doctrine which these States held as to charitable and religious trusts in general. These States were New York, Wisconsin, and Minnesota. The former two have since sustained bequests for Masses; while the latter should do so under its recent statutes.

Kansas, too, might be regarded as doubtful, but with the probability that it will continue to support these bequests. The case that was presented to the courts in that State was hardly typical, since the priest beneficiary was the grandson of the testatrix, and the bequest was regarded as a gift. It is not certain whether every Mass bequest would be so construed.[2]

In New York, a bequest for Masses has been regarded in every one of the views presented herewith except that it is a private trust. Nevertheless, it seems fairly consistently to have been regarded as a charitable bequest in the highest court of the State. It was held to be such in the case of Holland v. Alcock (1888),[3] but invalid. The court declared that, to be sustained, bequests for Masses should be given to incorporated societies, just as other charitable bequests. This decision was followed in Gifford v. O'Connor (1889),[4] in a case

[2] Cf. *Ecclesiastical Review*, LXII (1920), 650, 651; LXIII (1920), 289.

[3] 108 N. Y. 312, 16 N. E. 305; cf. *Ecclesiastical Review*, XX (1899), 168; Dillon, W., *Bequests for Masses* (Chicago, 1896), p. 49.

[4] 117 N. Y. 275, 22 N. E. 1036.

where no priest beneficiary was named. In 1918 the problem was again before the Court of Appeals, and this time it was regarded as a valid charitable bequest, in a decision reversing the lower court which had reduced a residuary estate to an allowance of five dollars for Masses. The higher court held that the balance was a trust for a certain public charity, that is, for Masses, and that the testatrix had no desire to die partially intestate.[5] This is now the ruling law of the State.

Prior to the decision in the case of Holland v. Alcock, it was held in Holland v. Smith (1886) that a provision in a will for Masses is valid and enforceable, seemingly on the theory that it is a provision for funeral expenses. This is the theory also behind the decision in the lower court in the case *In re* Backes (1894)[6] where the court held that a bequest for Masses to be celebrated in a German Catholic Church in the City of Buffalo was not indefinite. But this theory seems to have been abandoned in a decision of the intermediate court in 1906, which nevertheless regarded the bequest valid.[7] But it was reasserted by the same court in 1920.[8]

Three years prior to the Holland v. Alcock decision a bequest for Masses had been sustained as a gift *inter vivos* (1885).[9] The circumstances were these. The decedent had given a fund to the trustee with the obligation that he would support her and her husband during their lives; that he would pay all funeral expenses, erect a monument, and have Masses said for the repose of their souls. The lower court held that she could have revoked the commission, and that the trust was invalid for the want of a beneficiary.

[5] Morris *et al.* v. Edwards *et al.*, 227 N. Y. 141, 124 N. E. 724. The will bequeathed the rest, residue and remainder of the testatrix' estate to the executor to pay for funeral expenses, to have Masses said, and to erect a tombstone. The lower court held that this was a trust in the executors to be discharged in accordance with the condition in life of the decedent, and allowed only five dollars to comply with the provision for Masses.

[6] 30 N. Y. Supp. 394, 9 Misc. Rep. 504.

[7] *In re* McAvoy's Estate, 98 N. Y. Supp. 437, 112 App. Div. 377. The reason for the reversal was probably that if the bequest were regarded as funeral expenses, it would have been exempt from the transfer tax.

[8] *In re* Dwyer, 182 N. Y. Supp. 64, 192 App. Div. 72 (where the court said that the lower court should not have treated a bequest for Masses as a legacy, but as an expense which should have been deducted in determining the net estate).

[9] Gilman v. McArdle (1885), 99 N. Y. 451, 2 N. E. 464.

But the Court of Appeals held that the commission was more than a mere agency, and consequently an irrevocable trust, a valid contract *de praesenti* to be executed after death, similar to one in which a man would hire a sculptor to make a statue of him after his death. Obviously, in the latter case, no beneficiary would be needed. A similar arrangement was held valid in 1904; but in 1905 the court, while admitting the validity of a trust established *inter vivos*, demanded evidence to show the intention of the testator. In 1907, however, a trust of this kind was again sustained, even where a priest was the trustee.[10]

In the very next year after the Holland v. Alcock decision, a bequest for Masses was sustained as a gift to a Catholic church named as trustee, along with bequests for poor students, and for the establishment of a Catholic newspaper.[11] And in the same year where a designated priest was named beneficiary, the bequest was sustained in a similar case.[12] The following year, bequests for Masses to several pastors and to the Bishop of Long Island were held to be gifts to individuals.[13] And on the same theory, Mass bequests were sustained in 1893 and 1898.[14] These decisions must be viewed in the light of the ruling law of the time, which was that

[10] Morris v. Hughes (1904), 92 N. Y. Supp. 288, 45 Misc. Rep. 278; Hoffman v. Union Dime Savings Institution (1905), 95 N. Y. Supp. 1045, 109 App. Div. 24; Morris v. Wulcher (1906), 100 N. Y. Supp. 878, 115 App. Div. 278. In the first of these cases, five thousand dollars had been validly transferred by the decedent before death to the trustee with the obligation of supporting her, paying the expenses of her funeral, and giving one thousand dollars to a priest designated by name for Masses—held a valid trust *inter vivos*.

[11] Rupple v. Schlegel *et al.*, 7 N. Y. Supp. 936.

[12] *In re* Black's Estate, 5 N. Y. Supp. 452, 1 Con. 477.

[13] Vandeveer v. Kane, 11 N. Y. Supp. 808. Cited in *Ecclesiastical Review*, XIX (1898), 542; XX (1899), 170.

[14] *In re* Howard's Estate (1893), 25 N. Y. Supp. 1111, 5 Misc. Rep. 295 (where three hundred dollars was left to two priests, one of whom had died prior to the testator; the bequest was held a valid gift on condition to the surviving priest; invalid, however, as to the deceased priest because he was incapable of fulfilling the condition); cited in *Ecclesiastical Review*, XIX (1898), 542; XX (1899), 170. *In re* Zimmerman's Will (1898), 50 N. Y. Supp. 395, 22 Misc. Rep. 411 (six hundred dollars bequeathed to a priest described as being stationed at a certain church was held to be a conditional gift to the priest and not a trust, inasmuch as it was not to the church or for the benefit of the church).

of Holland v. Alcock. As gifts, the bequests could be withdrawn from the effect of the latter rule.[15]

The view that a Mass bequest is a *valid* charitable bequest, embraced by the Court of Appeals in 1918, was advanced in the Surrogate Court of Kings County as early as 1909, which applied to bequests for Mass the liberal statute enacted in 1893 as to charitable bequests in general.[16]

This view seems now to be the unmistakable doctrine in New York, as is evidenced by a number of decisions in the lower courts.[17] A very late decision, after stating that Mass bequests are general legacies for charitable purposes and not necessarily part of the funeral expenses, thought that if the Masses were celebrated as part of the funeral services and the amount was reasonable, it might be allowed under the items of the funeral charges.

In conclusion as to the law in New York, two points seem well established: first, that a trust for the celebration of Masses can be constituted in that State prior to death, if sufficient evidence is left to prove that a real and irrevocable trust was instituted; second, that bequests will be regarded as public or charitable legacies subject to deductions if the testator exceeds the legal amount which he is permitted to bestow in charity.

In Pennsylvania, Mass bequests are held to be charitable. The question seems first to have come before the courts in 1878 when it was attempted to save a bequest for Masses from the operation of the statute prescribing that charitable bequests must be made at least thirty days prior to the testator's death.[18] The Orphans' Court of Philadelphia County had held that a bequest for Masses is not a charitable bequest but a private bequest for the benefit of the testator.[19] But two years later the Supreme Court decided that such

[15] A further purpose may have been to prevent an excessive total of charitable bequests. California courts rendered a similar decision with a similar purpose.

[16] *In re* Eppig's Estate, 118 N. Y. Supp. 683; 63 Misc. Rep. 613.

[17] *In re* Welch (1918), 172 N. Y. Supp. 349, 105 Misc. Rep. 27; *In re* Beck's Estate (1927), 225 N. Y. Supp. 187, Misc. Rep. 765 (where the bequests for Masses were reckoned among the charitable bequests in determining what proportion of the estate the decedent had given to charity); *In re* Werrick's Estate (1930), 239 N. Y. Supp. 740, 135 Misc. Rep. 876; *In re* Cunningham's Estate (1931), 249 N. Y. Supp. 439, 140 Misc. Rep. 91.

[18] Act of April 26, 1855, § 11; Pennsylvania Statutes, § 8312.

[19] *In re* Dougherty, 12 Phila. 70.

a bequest is a charitable bequest, and this is the rule since that time.[20]

The New Jersey courts are most favorable to bequests for Masses, on the ground that they are charitable bequests. Thus in 1898, where the priest appointed beneficiary died prior to the testator, the court appointed another.[21] In 1900, a bequest for Masses to Woodstock College, in Howard County, Maryland, was ordered paid to Woodstock College, of Baltimore County, as there is no other college of that name in Maryland. The court said that the absence of proof to show that Masses are not said at the College left no other course than to award the legacy.[22] As recently as 1929, a bequest for Masses given to a priest who never existed was invalid, but one hundred dollars of the bequest was ordered paid as funeral expenses, even though one charitable bequest in the same will was

[20] Rhymer's Appeal (1880), 93 Pa. 142—cited also in *Ecclesiastical Review*, XIX (1898), 542; Appeal of Seibert (1886), 6 Atl. 105 (where immediate payment of the full sum to the priest was ordered, minus the collateral inheritance tax; cited in *Ecclesiastical Review, loc. cit.*); *In re* O'Donnell's Estate (1904), 209 Pa. 63, 58 Atl. 120; Nead's Estate (1914), 55 Pa. Supp. 573 (where the court, while incidentally approving the prevailing doctrine, said that it was not necessary to resort to the doctrine of charitable bequests in order to sustain the bequest before the court, because there was no indefiniteness as to amount, purpose, or trustee—the latter was to spend the money with power to choose whomsoever she might wish; but the bequest was subject to the collateral tax.

A curious case connected with this problem arose under the will of Father Browers, who left his estate to "a Roman Catholic priest that shall succeed me in this said place, to be entailed to him and his successors, and so left by him who shall succeed me to his successors, and so in trust for the use herein mentioned in succession forever." It was argued that because there was an obligation of celebrating Masses attached to it, this was a bequest for Masses, and that Father Fromm, who had taken possession of the parish by agreement with the executors, but without the authority of Bishop Carroll, and who, though interdicted and suspended, could not lose the power of saying Mass validly, was able to fulfill the requirements of the bequest and could not therefore be dispossessed. The court decided that Father Browers meant to establish a trust for the congregation and that the saying of the Masses was incidental. Since Father Fromm was not the lawful successor of Father Browers, he could not retain possession. Cf. Lessee of Executors of Theodorus Browers v. Franciscus Fromm—Westmoreland County, 1798. Cf. also McGirr v. Aaron (1829), 21 Am. Dec. 361, where this same bequest was held to be a charitable gift to the congregation.

[21] Kerrigan v. Tabb *et al.* (1898), 39 Atl. 701; Moran v. Kelley *et al.* (1924), 95 N. J. Eq. 380, 124 Atl. 67 (affirmed in 100 N. J. L. 305, 126 Atl. 924.

[22] Kerrigan *et al.* v. Connelly *et al.* (1900), 46 Atl. 227.

held invalid for want of a trustee and of definite beneficiaries (it was given to *some* Catholic institution).[23]

Illinois courts regard them as valid charitable bequests.[24] In one case a priest had been made beneficiary and had been given by the testatrix a deed for realty, a promissory note, and a certificate of deposit. He was held not entitled to the former two documents, but only to the last because it was given to him for Masses, the court alleging two reasons for this concession: first, that the gift was intended for charity and in support of a form of worship; and second, that the priest would be obliged to perform the religious services and thus would earn the money.[25]

This is the prevailing view in Kentucky,[26] Massachusetts,[27] Missouri,[28] New Hampshire,[29] and Indiana.[30]

Wisconsin courts seem always to have regarded these bequests as charitable. But due to a peculiar theory in that State which once subjected public trusts to the same requirements demanded of pri-

[23] Chelsea Nat. Bank v. Our Lady Church (1929), 147 Atl. 470.

[24] Hoeffer *et al.* v. Clogan *et al.* (1898), 171 Ill. 462, 49 N. E. 527; Burke *et al.* v. Burke *et al.* (1913), 259 Ill. 262, 102 N. E. 293.

[25] Gilmore v. Lee (1908), 237 Ill. 402, 86 N. E. 568.

[26] Coleman *et al.* v. O'Leary's Executor *et al.*, 114 Ky. 388, 70 S. W. 1068. The court in rendering the opinion said, "a gift . . . for the establishment of a church would not . . . be avoided by a provision that the church should be called by the name of the testator." Thus a private benefit is consistent with a public trust. Cf. also Obrecht v. Pujos (1925), 206 Ky. 751, 268 S. W. 564. In this case a Trappist novice bequeathed three hundred dollars for Masses for his soul, and the bequest was regarded as a public benefit as conducing to the promotion of public worship, and was held not to fail for the lack of a trustee or because there is no beneficiary to enforce the fulfillment of the trust—the donee takes the bequest subject to a moral obligation and the next of kin may apply for enforcement—cited in *Ecclesiastical Review*, LXXXVIII (1933), 176.

[27] *Ex parte* Schouler (1883), 134 Mass. 426.

[28] Minturn v. Conception Abbey (1933), 227 Mo. App. 1179, 61 S. W. (2) 352.

[29] Webster v. Sughrow *et al.* (1898), 69 N. H. 380, 45 Atl. 139.

[30] Ackerman v. Fichter *et al.* (1913), 179 Ind. 392, 101 N. E. 493. Here the Masses were bequeathed for the repose of all poor souls. The court said that it was not a private trust, as it might be if the Masses were restricted to the souls of designated persons. The Mass, it said, is a public and general religious service, for the living as well as the dead; and those who are living, and the living kindred of those who are dead, have a direct interest in its enforcement which they can compel.

vate trusts, bequests for Masses failed in the case, McHugh v. McCole *et al.* (1897).[31] Due to a later modified attitude of the courts, a bequest for Masses was sustained in 1910, where the court, fearful still of enforcing *devises* which violated the statute against perpetuities, decided that realty involved had been converted into personalty by the decedent. The concurring judge denied the necessity of relying on equitable conversion, arguing that devises of realty to public trusts are exempt from the statute against perpetuities. On the other hand, the dissenting judge said that the court could not compel the performance of a religious ceremony, and that consequently the trust must fail. The majority view held that the court could compel the performance of the religious ceremony not *per se* but under the contractual aspect of the trust.[32]

Iowa, on the other hand, regards these bequests as private trusts. In 1897 the court said that a bequest for Masses was valid when made to a priest who may be pastor at a definitely named church at the time of the execution of the will, even though the bequest contains no element of a charitable use.[33] It is said to be a private trust as much as the erection of a monument or any other act to perpetuate the memory of a testator. The court recognized the difficulty that caused the courts in Alabama [34] to declare a private trust invalid, that is, the lack of a beneficiary. But it regarded itself as above quibbling about technicalities, when the bequest was evidently for a lawful purpose with power of execution prescribed and available. The decision, it must be said, rests on rather insecure ground. It is, however, the ruling law, for a similar decision was rendered in 1919, where a bequest for Masses was to be paid out of the proceeds of the sale of land and no priest beneficiary was named. The court sustained the bequest as being sufficiently definite in its

[31] 97 Wis. 166, 72 N. W. 631.

[32] *In re* Kavanaugh's Estate, 143 Wis. 90, 126 N. W. 672—cited in *Ecclesiastical Review,* LXXXVIII (1933), 172.

[33] Moran v. Moran *et al.*, 104 Iowa 216, 73 N. W. 617—cited in *Ecclesiastical Review,* XIX (1898), 542; XX (1899), 169. In a prior case, Seda v. Huble (1888), 75 Iowa 429, 39 N. W. 685, property given to a church with the obligation of an annual Mass was held charitable.

[34] Festorazzi *et al.* v. St. Joseph's Catholic Church *et al.* (1894), 104 Ala. 327, 18 So. 394—cited in *Ecclesiastical Review,* XX (1899), 168; LXXXVIII (1933), 174.

beneficiaries, who were the testator and his wife, for the repose of whose souls the Masses were to be celebrated.[35]

The final view remaining to be considered is that these bequests are personal gifts. Rhode Island and Kansas adopted this view in the same year. However, only one case has been decided by the highest court in Kansas, and there the priest was the grandson of the testatrix and the language was precatory. The court said that the donee was responsible to his conscience alone for the fulfillment of the trust.[36]

The court in Rhode Island had before it the various decisions rendered prior to 1898, and deliberately accepted the view that the bequest is personal to the priest, taking effect at once as any other personal bequest. It is compared to a mourning ring to be worn in memory of a deceased person. A benefit is conferred on the deceased through a benefit to the beneficiary. Moreover, one can not be a trustee for himself.[37] The argument was repeated when the same case was brought once more to the attention of the court in an attempt to resist abatement of the bequests for Masses. The court argued that the bequest was not to abate with the other legacies, for it is really only a payment for the services of the priest, on the principle of a consideration arising after the testator's death.[38] In 1923, a gift for Masses was sustained where the words of the bequest were that one hundred dollars is bequeathed " for religious services in memory of me, my parents and relatives — I request that said sum be given to Rev. John Murry, of SS. Peter and Paul's Parish, in said Providence (if in the Diocese of Providence), or to such other priest as the executor decides." The executor had died without making any choice. The administrator was directed to pay the sum to the priest named.[39]

In 1907, the courts of California adopted this view, thus withdrawing bequests for Masses from the disabilities arising out of the statutes requiring that charitable bequests be made more than thirty days prior to the decease of the testator and limiting the amount of

[35] Wilmes v. Tiernay (1919), 187 Iowa 390, 174 N. W. 271—cited in *Ecclesiastical Review,* LXXXVIII (1933), 175.

[36] Harrison v. Brophy *et al.,* 59 Kan. 1, 51 Pac. 883.

[37] Sherman v. Baker *et al.,* 20 R. I. 446, 40 Atl. 11—cited in *Ecclesiastical Review,* XX (1899), 169.

[38] 20 R. I. 613, 40 Atl. 765.

[39] Slattery v. Ward, 45 R. I. 54, 119 Atl. 755.

bequests available to charity.[40] In 1918 a case came before the court where the trust was instituted during the life of the testatrix and was to be paid after her death in stipends for Masses. It was attacked because it was given to a church and not to a priest, and could not, it was alleged, be held as a personal gift for that reason. The court said that it was given to the pastor by implication.[41] In 1920, the courts, while still holding that bequests to pastors are gifts, agreed that they are charitable trusts when bequeathed to bishops, on the ground that bishops must distribute the stipends to priests.[42]

The California position seems to be the correct one. There is, of course, merit in the other views. The Mass is a public religious service, in which the living may participate actively; in the benefits of which they share even when not participating actively. On the other hand, there can be no doubt that in making bequests for Masses the testator usually is not prompted primarily by a desire to promote public worship. Bequests for that purpose are usually made to the church in a general way. The testator almost always desires that Masses be offered for the repose of his soul, sometimes joining the souls of his relatives. It is on this ground that Iowa and Alabama courts regard Mass bequests as private trusts.

To approach an analysis of the problem methodically, observe that Masses may be bequeathed to a priest, to a bishop, indefinitely to no one, to a church or institution, or they may be required of an incumbent of a founded institution. Moreover, when they are given to a church or an institution they may be granted in such a way that the capital is to be expended as soon as possible for the celebration of Mass or that only the income is to be expended annually for this purpose.

First, consider Masses bequeathed to a priest by name. Such bequests are really gifts. While the bequest may be called a trust in a moral sense, it is not a trust in a legal sense. This is evident from four arguments, viz., from experience, from the nature of the Mass, from the manner in which the bequest is taken, and from the manner in which the obligation is discharged.

[40] *In re* Lennon's Estate, 152 Cal. 327, 92 Pac. 870 — cited in *Ecclesiastical Review*, LXII (1920), 651; LXIII (1920), 289.

[41] Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490. Cf. *In re* Ward's Estate (1932), 14 Pac. 91.

[42] *In re* Hamilton's Estate, 181 Cal. 758, 186 Pac. 587.

Experience shows that when a Catholic gives stipends to a priest for Masses he has no idea of reclaiming the money, even if the Masses were not said. Rather, he would insist on the saying of the Masses. From the nature of the Mass, it follows that it can not be bought. The priest has the power to offer this Sacrifice; the layman not. The latter can not buy this favor; the former can not sell it. But by accepting the gift of the latter, the former binds himself to bestow the favor on the donor rather than on some other person who has not shown benevolence to him. In taking the gift, the priest becomes not merely the trustee with legal title; but the owner with legal *and equitable* title. If the money is lost, he is not discharged. He is still bound to celebrate the Masses, just as he is bound to the faithful of his parish by reason of a special claim, arising out of a contractual relation. But he is bound not as trustee but as promisor.[43] Finally, when stipends are bequeathed to a priest by name, if he finds it necessary to enlist the aid of another priest, he sends only the usual stipend, retaining the excess for himself. If this does not establish the bequest as a gift, it at least shows that there is no essential connection between the bequest as such and the duty to say the Masses.[44]

On the other hand, bequests for Masses given to a bishop would seem to be a trust. So also with Masses for which stipends have been bequeathed indefinitely. In this case, the trust is imposed on the executor. Even if such a trust were to be held as a private trust, there is no reason why it should fail for want of a beneficiary to enforce it. The executor or administrator is conceived to be capable of representing the decedent in enforcing obligations resulting from contracts made by the latter. Why can he not represent the decedent in enforcing the distribution of the stipends prior to his discharge as trustee? That is as far as the decedent wished the obligation of the trust to extend, not to the actual saying of the Masses. In the nature of the case, no one can see to this except the

[43] Cf. Canon 829.

[44] This would be true of founded Masses in the case in which the institution burdened is obliged to distribute *ad instar manualium* stipends for Masses to which it is obliged. It is not true of stipends given in small allotments, even to a priest by name, unless the donor clearly indicated that the excessive amount was intended for the priest designated—cf. Vermeersch-Creusen, *Epitome Iuris Canonici* (4. ed., 3 vols., Mechlin, 1930), II, 106, 108. Nor is it true of Masses given to a church for distribution even by will—Cf. S. C. C.—*Fontes*, nn. 4228, 4321.

priest who takes the stipend. The testator could not see to it himself, if he were alive. It is entirely a matter of internal intention on the part of the celebrant of the Mass. The trustee then taking the place of the testator places the stipend in the hands of one who agrees to celebrate the Masses, and his task is done. This solution answers the objection that a court can not compel the performance of a religious ceremony. The testator does not wish the court to attempt this. All the testator desires is proper distribution of the stipends.

If the stipends are given to a church or an institution with the understanding that they are to be celebrated as soon as reasonably possible, they are gifts to the priests who may be at the institution or the church, under the obligation of celebrating the Masses. The person in charge administers the fund. If the body is legally incorporated, the courts will probably accept this interpretation of the testator's wishes. If not, the familiar problem of distribution by trustee arises once more.

Finally, the obligation of saying Masses may be established for a long period of time, either by depositing with the church or the institution a definite fund the income of which is to be used for stipends; or by annexing the obligation to the foundation of a charitable institution. As the obligation of saying the Masses in the latter case seems incidental to the general charitable purpose, the bequest would stand with the principal intention and be sustained with it. In the former of the two plans here indicated one finds what is perhaps the only proper use of the term "trust" in connection with Mass bequests, for the fund needs administration and not mere distribution. Of course, these trusts can be sustained as charitable.

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MILITARY SERVICE IN THE INFANT CHURCH

In many quarters today the question of reconciling a man's profession of Christianity with his participation in a modern war is seriously discussed. Not infrequently early Christian writers are summoned to support the thesis that Christian principles are irreconcilably opposed to war and military service. An appraisal of the Christian position in antiquity can not be derived from theoretical discussions, but rather from the relations between the Christian on the one hand and the Roman Religion and the Roman Army on the other. One must aim at discovering to what extent the opposition to the Army was due to the entrenched strength of the Roman Religion in the armed forces and to the vices of the Army. This will provide a point of departure for an estimate of the antagonism to the Army as such and of itself.

The camp life of the army was saturated with practices significant of polytheism, in addition to the cult that was primarily directed toward the Emperor. The main lanes in the camp were lined with statues of the gods. The soldier, marching under the colors of his regiment, was marching under the standards of idolatry, for the standards were regarded as divine and worship of them was a duty of the service. All contained one or more idolatrous symbol.[1] Josephus tells, for instance, of Roman soldiers paying homage to their military standards after a triumphant attack on Jerusalem in the year 70. "And now the Romans . . . brought their ensigns to the temple; and there did they offer sacrifices to them."[2] Tertullian says that the standards meant more to the soldiers than all their gods put together: "The camp religion of the Romans is through and through a worship of standards, a swearing by them, and they are preferred to all the gods".[3] Seneca says that "the primary bond of military life is the religious attachment and love of the standards, and the wrong of desertion".[4] He speaks of a return to the "standards and gods of war" as if one were the same as the other. Livy, speaking of the religious character of the standards and the oath, says the soldiers are prepared to swear even to things

[1] Ramsay, *The Letters to the Seven Churches,* (New York, 1905), p. 345.

[2] *Wars of the Jews,* (translation by Whiston), VI, 6, 849.

[3] *Apologeticum,* 16, (Oehler, I, 178).

[4] *Epistolae Morales,* (Loeb, London, 1925), III, 81.

they know are not true. [5] Before battle and after victory they offered sacrifice. The common soldier, however, was a passive participant in the cult of the emperor,[6] which was conducted by the officers.

The military oath, on the other hand, was not a passive thing. In the time of the emperors, from Augustus onward, the oath (*sacramentum*) was no longer merely a pledge of loyalty to one's general; it was an act of absolute allegiance to the State for the term of service.[7] The oath was at once a civic and religious act, involving the patriotic duty of worshiping the emperor. Refusal to comply with the forms of this cult meant both a capital crime of disloyalty or treason as well as an act of irreligion.[8] On the festive days of the emperor or his family, and on days of victory or their commemoration, the religious rites of the cult were scrupulously observed. Even the conferring of military honors was marked with a religious significance. The crown, so often associated with the gods of the pagans, was given on festive days.[9]

The moral conditions in the Army seem to have left much to be desired. It was no longer a citizen-army, but a professional, mercenary army, cold-blooded, cruel, violent.[10] One of the attractions for enlistment was the opportunity for booty.[11] Moreover, soldiers were bound by oath not to marry during the period of their service, with consequences not too difficult to imagine. Some camps numbered as many bastard soldiers as legitimate.[12]

On the Christian side there developed the concept of the mystical warfare which probably exercised some influence in creating antagonism to the real warfare of the army. Baptism came to be regarded as the *sacramentum* or oath which bound the Christian to Christ, his *Imperator*. This mystical transfer had its source in the

[5] *Ab Urbe Condita,* (ed. Muller, Lipsiae, 1900), III, 170.

[6] Bigelmair, *Die Beteilung der Christen am öffentlichen Leben in vorconstantinischer Zeit,* (München, 1902), p. 179.

[7] Seeck, *Geschichte des Untergangs der Antiken Welt,* (Berlin, 1897), I, 248, 266; cf. *Vegetius,* (Lang Lipsiae, 1885), I, 39.

[8] Zeiller, "L'empire romain et l'eglise"—*Histoire du Monde* (Paris, 1928), V, 37; cf. Ramsay, *The Church in the Empire,* p. 275.

[9] Tertullian, *De Corona,* (Oehler, I, 442).

[10] Rostovtzeff, *Social and Economic History,* p. 42.

[11] Seeck, *op. cit.,* I, 242.

[12] *Ibidem,* 266.

pagan philosophers, especially Socrates,[13] Plato,[14] and the Stoics, Epictetus[15] and Seneca.[16] In the Gospels Christ speaks of sending "not peace but the sword",[17] and teaches that "the kingdom of heaven suffereth violence, and the violent take it away"[18] and the battle imagery of the Old Testament is graphically incorporated in the Apocalypse in the figures of the Judge and his host of angel warriors.[19] The most telling presentation of the idea is in St. Paul's Letter to the Ephesians: "Put you on the armor of God . . .,[20] where the struggle of the Christian is against the overpowering forces of darkness. Yet the soldier of God for St. Paul seems to be the missioner only, who is nevertheless constantly represented as being engaged in a field campaign.[21] Pope St. Clement, on the other hand, seems to regard all Christians as soldiers of Christ,[22] and so does St. Ignatius of Antioch.[23] The concept is found also in St. Justin Martyr[24] and Clement of Alexandria.[25] Origen holds the true soldier of Christ to be the monk who has rejected the world.[26] Tertullian goes so far as to call even the soldier of Caesar a non-soldier (*paganus*, a townsman) relative to Christ.[27] St. Cyprian sponsors similar concepts.[28] After the time of Tertullian the use of

[13] Plato, *Apology,* (Loeb, New York, 1914), 28 D, I, 103, 105; 28 E, I, 105.

[14] Plato, *Menexenus,* 246 B (Loeb, New York, 1939), VII, 371; *Symposion,* 179 A (Loeb, New York, 1925), V, 103; *Crito,* 51 B (Loeb, New York, 1914), I, 100; *Laws,* 626 E (Loeb, New York, 1926), IX.

[15] *The Discourses,* 3, 24, 31, 34 (Loeb, New York, 1928), II, 195.

[16] *Epistolae Morales,* (Loeb, New York, 1917-1925), Ep. 17, 6—I, 113; Ep. 93, 4—III, 5; Ep. 96—III, 107; Ep. 107, 9—III, 226 sqq.; Ep. 120, 18—III, 393; "To Polybius on Consolation", 5, 4—*Moral Essays,* (Loeb, New York, 1932), II, 371.

[17] Matt. 10: 34.

[18] Matt. 11: 12; Luke 22: 36; 12: 49-53.

[19] Apocalypse, Ch. XIX.

[20] Ephesians, 6: 10-18; II Cor. 10: 12.

[21] Rom. 16: 7; Philemon, 23; II Tim. 2: 3-5; I Cor. 9: 7.

[22] *I Ad Corinthios,* 21, 28, 37 (PA, I, 256B, 268B, 281B).

[23] *Ad Polycarpum,* 6, (PA, V, 868B); *Ad Smyrnos,* 1, (PA, V, 708B.)

[24] *Apologia,* I, 11, 39 (PG, VI, 341B, 388B-C).

[25] *Protrepticus,* XI, 117 (GCS, Clement Alexandria, I, 82, Stählin).

[26] *In Numeros* Homilia 18, 4; 25, 4-5; 26, 2 (GCS, Orig. VII, 175, 238-240, 244, Baehrens).

[27] *De Corona,* XI, (Tert. I, 443-445, Oehler).

[28] *Ep. 10, 1* (CSEL, 3, 2, 513, Hartel).

military figures in the Western Church is abundant. That this spirited and warlike mentality should have existed among great masses of people without any concerted attempt to overthrow the Roman State is an occasion of tribute from Harnack. "That was the glory of the Church when she was still under the sword of Caesar. In many provinces the Christians were numerous and powerful enough to gather and organize an insurrection. She did not do it." [29]

It is a striking fact that the first evidence of a clash arises only in the time of Marcus Aurelius. What is the explanation of this? First, numerically there would have been few Christians who would be called to army service. The army in normal times consisted of only 300,000 men in a population of 16,000,000, in which the Christians at first were but a handful. Only 20,000 men annually were needed to keep the army at full strength.[30] With Augustus emphasis came to be placed on attracting men to the army rather than on conscription.[31] Even when it was enforced, conscription affected only Roman citizens capable of bearing arms.[32] Even then one could obtain a substitute to take his place.[33] Great numbers of the Christian converts were slaves [34] and these were not permitted to enlist until the fifth century. Secondly, those Christians who were in the army did not advert to any incompatibility or found a means of reconciling passive assistance in the pagan rites with the Christian Faith.[35] In those early days of Christianity, the eye of the Christian was centered on heaven, leaving worldly matters but a small

[29] *Die Christliche Religion und der Soldatenstand in den ersten drei Jahrhunderten* (Tübingen, 1905), p. 47.

[30] Grösse, *Römische Militargeschichte von Gallienus bis zum Beginn der Byzantischen Themen Verfassung* (Berlin, 1920), p. 201. Cf. Seeck, *Geschichte*, I, 254, 260.

[31] Mommsen, "Römische Staatsrecht"—*Handbuch der Römischen Alterthümer von Joachim Marquardt und Theodor Mommsen*, (Vols. I, II, Leipzig, 1876, 1877), II, 849.

[32] Seeck, *Geschichte*, I, 243.

[33] Newmann, *Römische Staatt und die Allgemeine Kirche bis auf Diocletian*, (Leipzig, 1890), pp. 127 sqq.

[34] Minucius Felix, 8—Migne, PL, III, 258.

[35] Cf. D. (49, 16) 11; Roak, *A History of Rome to 565 A.D.* (New York, 1921), p. 336.

place in his life. Reform of the very evil practices of the time was too remote a prospect for him.[36]

But with the increase in the numbers of the Christians there arose the consciousness of a world mission. Great numbers of soldiers were becoming Christians. In the light of these two factors a clash appeared manifested both in the conduct of the convert soldiers themselves and in the teaching of Christian writers of the time. The reactions of both must be measured with constant reference to the religious and moral situation in the army and to the attitude of the Christian mind conceiving itself as dedicated to a supernatural militia.

Among the writers, Tatian seems first to be aware of the clash. He is opposed to the bloodshed as such. He says, "You wish to make war, and you take Apollo as a counselor of slaughter . . .", implying that it is a thing contrary to Christian teaching.[37] Athenagoras, writing shortly after Tatian, speaks of avoiding even the sight of murder, "since we think that the sight of killing is almost the same as the perpetration of it".[38]

Tertullian, the Christian apologist, actually boasts of the Christians in the camps. "We sail with you and we fight with you . . ." "We are but of yesterday and we have filled every place among you . . . fortresses, towns . . . *the very camp* — we have left you only the temples of the gods." Yet for two reasons one must not be certain that Tertullian was advocating army life for the Christian. The first is that he indicates in the same context a counsel of abstention from wars in the very act of making an argument for the military efficiency of the Christian: "for what wars should we not be fit, not eager, even with unequal forces, we who so freely yield ourselves to the sword, if in our religion it were not counted better to be slain than to slay."[39] This is a counsel which, we sense, Tertullian in his passionate eagerness would like to make a universal norm of Christian conduct. Secondly, Tertullian was writing for a pagan audience. To have come out bluntly against war and any participation in it would have deprived him of an argument, and a forceful one in view of the objections raised. It is

[36] Bigelmair, *Die Beteilung*, p. 79.

[37] *Oratio ad Graecos*, 11, 19—*Texte und Untersuchungen*, (Leipzig, 1888, Gebhardt-Harnack), Book IV, 11, 21.

[38] *Legatio pro Christianis*, 35—*Texte und Untersuchungen*, Book IV, 11.

[39] *Apologeticum*, 37, 42 (Oehler, I, 250, 251, 273).

evident, moreover, that especially later Tertullian did not hesitate to snatch up any straw of argument or legal turn of phrase to support his case. Harnack accuses Tertullian of insincerity in presenting his views about military service.[40]

Later (about 211) in *De Idololatria* and *De Corona*, Tertullian addresses not pagans but Christians. On the other hand Tertullian at this time had become distinctly puritan or montanist in his outlook. In the latter work, he deals with the wreath which the soldiers customarily wore when receiving a bonus from the emperor. The occasion for the work was the refusal of a Christian soldier to wear it when Antonius Severus made a donative of this kind at his accession to the throne. Tertullian shows that the wearing of the wreath is contrary to Scripture, Christian practice, and even nature itself. From the viewpoint of the Christian, however, the chief objection to it is its intimate association with idolatrous practice. Finally, Tertullian brings himself to ask the question: why treat about the accidental when the very thing on which it is based is wrong? He shows at great length the incompatibility between military service and Christian teaching in a series of antitheses.[41] The same fundamental opposition he develops in *De Idololatria*.[42] In both there is evidence that some soldier converts abandoned army life, that others attempted a reconciliation of the Faith with their vocation. Tertullian, however, seems the first to have directed a frontal attack on such an attempt, and even he seems unwilling to impose a strict moral obligation on those who were soldiers before their conversion. His whole argument, moreover, is based upon the sophistry that the mystical service in the militia of Christ excludes every other kind of military service. Indeed Tertullian may have entirely misunderstood the purpose the soldier had in removing his wreath. It may have been a protest against discrimination in favor of the followers of Mithra who enjoyed the privilege of taking off the wreath when it was presented to them.[43]

The question involved moral prudence, casuistry, for which Tertullian, especially as a montanist, was totally unfitted. He was incapable on account of his temperament to give a practical solution

[40] *Op. cit.*, pp. 59, 60.

[41] *De Corona*, XI, (Oehler, I, 442-446).

[42] *De Idololatria*, XIX, (Oehler, I, 101, 102).

[43] *De Corona*, XV, (Oehler, I, 460).

to a practical problem. Moral idealism and theory were his realm.[44] His treatment of the question is completely colored by the much larger question; that of polytheism, at which the whole sense of the man revolted.[45] To remove from Christians the danger of idolatry he forbade them almost all manner of participation in the secular life of the time.[46] Very likely his position sounded just as unreal and unsound to the Christians of his day as it sounds to us today. It was only the few rigorists who forced or would have these men, converts while in service, leave their posts.[47] Even when the rigorous attitude was in the air, it was not carried out to any notable extent in practice.[48]

St. Cyprian laments the fact that "homicide, when committed in individual cases, is a crime; but it is called a virtue when done publicly. Not innocence but the magnitude of slaughter secures impunity for the crimes," [49] and he cites with approval the departure of some men from the army in order, as he says, to become soldiers of God.[50]

Origen discussed war and peace in replying to Celsus who was concerned lest Christian monotheism should obliterate national characteristics and thus destroy the heterogeneity on which the Roman Empire seemed to prosper. Celsus regarded homogeneity impossible and regarded any one who thought otherwise as ignorant and a threat to the State. A religious element entered into his thinking, as he conceived of the distinct units as governed by a preternatural entity under an eternal plan, to disturb which was doubtless impiety.[51] To address one God was an act of impiety, "the language of sedition, and is only used by those who separate themselves and stand aloof from society." [52] Origen takes the stand that homogeneity means peace and that the reign of peace, the Pax Romana, was chosen by Christ for His entry into the world pre-

[44] Cf. Tixeront, *A Handbook of Patrology* (St. Louis, 1920).

[45] Harnack, *Mission und Ausbreitung,* p. 295.

[46] Cf. *De Idololatria, passim.*

[47] Bigelmair, *Die Beteilung,* p. 178.

[48] Harnack, *loc. cit.*

[49] *Ad Donatum,* 6, (CSEL, 3, 1, 8, Hartel).

[50] Ep. 39, (CSEL, 3, 2, 581-585, Hartel).

[51] *Contra Celsum,* V, 25, (GCS, Origen, II, 26, 27, Koetschau).

[52] *Contra Celsum,* VIII, 2, (GCS, Origen, II, 222, Koetschau).

cisely that the unity in the State might be the means for accomplishing unending peace through religious unity.[53] He condemned war and denied that Christianity was a revolt against Judaism, as Celsus maintained. His view is that the Christian lawgiver forbade the killing of any man whatever.[54] He bluntly refuses the invitation of Celsus to take up arms under the emperor, "even if he should force us to fight".[55] This is not prompted by a lack of patriotism, for the Christian fights for his country with spiritual arms.[56] Even the pagan priests, he argues, keep their hands free of blood, why not the soldiers in the army of piety?[57]

On the other hand, Origen does refer to the aid which Christians give "those who are fighting in a righteous cause".[58] This might indicate that he did recognize that under natural morality, at least, wars could be just. In another place he remarks rather incidentally, "Perhaps the so-called wars among the bees convey instruction as to the manner in which wars, if ever there arise a necessity for them, should be waged in a just and orderly fashion among men."[59] Again he justifies even for the Christian self-defense as analogous to conspiracies to overthrow a tyrant.[60] Finally, about 215 he gave instructions in the Faith to a commander in the Third Legion of Cyrene in Bostra.[61]

Grotius accuses Tertullian and Origen as being too lofty in their theories, and points out their inconsistencies. He indicates the favorable construction that can be put on some of their statements, and in any event emphasizes that they are but the opinions of men and not of the authoritative position of the Church.[62]

More consistent than either Tertullian or Origen, Lactantius may

[53] *Contra Celsum,* II, 30, 79, (GCS, Origen, I, 157, 158, 201, 202, Koetschau).

[54] *Contra Celsum,* III, 7, (GCS, Origen, I, 207, 208, Koetschau).

[55] *Contra Celsum,* VIII, 73, (GCS, Origen, II, 290, 291, Koetschau).

[56] *Ibidem.*

[57] *Ibidem.*

[58] *Ibidem.*

[59] *Contra Celsum,* IV, 82, (GCS, Origen, I, 352, Koetschau).

[60] *Contra Celsum,* I, 1, (GCS, Origen, I, 56, Koetschau).

[61] Eusebius, *Historia Ecclesiastica,* (GCS, Eusebius, 2, 2, 563-565, Schwartz-Mommsen).

[62] Migne, (PL, 8, 881, note 1).

be said to be the most dogmatic in his pacifism, affording little opportunity in his writings for interpretation favorable to war.[63]

Several historical incidents point to the fact that Christians continued to serve in the army even in the period when some Christian writers seemed opposed to this procedure. About 250, during the persecution, there is the case in which a group of soldiers sought to strengthen the weakening resolve of a fellow soldier being tried for his Faith before a military tribunal.[64] Then in the reign of Valerian Marinus, a soldier in Cesarea, was about to be made centurion, when his competitor alleged that he was ineligible because he was a Christian. He acknowledged it and was beheaded. Up till this time, his confreres winked at the fact apparently, even though as an officer he must have frequently omitted the sacrifices that fell to his lot in the line of duty.[65] A third instance is that in which a veteran Christian soldier brought his son to camp for induction in the army. The father was surprised that the son refused to enlist, alleging that he was a Christian. The son was told that other Christians are fighting for the emperor. He said in reply that they knew what is good for them, but he could do no evil. Asked what evil the soldiers do, he replied quickly, "You know what they do".[66] The fourth instance is that of Marcellus, a centurion in Africa, who on the natal day of the emperor, disgusted by the pagan sacrifices and the riotous celebrations, threw down his arms.[67]

Probably the most revealing case is that of the Theban legion. There are good reasons for insisting that it is genuine.[68] The legion was loyal to the emperor and to the Faith, giving to Caesar what is Caesar's and to God what is God's. They refused, however, to obey an order to persecute Christians under the reign of Maximian about 286. At first the legion was decimated, and finally all were put to death.[69]

[63] *Divinae Institutiones,* I, 18; V, 17, VI, 20 (CSEL, 19, 68, 454, 558, Brandt-Laubman).

[64] Eusebius, *Historia Ecclesiastica,* VI, 22, 23 (GCS, Eusebius, 2, 2, 609, Schwartz-Mommsen).

[65] "Martyrium Sancti Marini"—*Acta Martyrum* (Ratisbonae, 1859), pp. 305, 306.

[66] *Acta Martyrum,* pp. 340-342.

[67] "Acta Sancti Marcelli Centurionis et Martyris"—*Acta Martyrum,* pp. 343 sqq.

[68] Bigelmair, *Die Beteilung,* pp. 198 sqq.

[69] *Acta Martyrum,* pp. 317-320.

These incidents indicate that in practice the life of a soldier was harmonized with the professions of Christianity. Indeed in the *Constitutiones Apostolorum* it is provided that the soldier who seeks entrance into the Church may be admitted provided he injure no one, is satisfied with his pay, and calumniates no one.[70]

Louis J. Miller, S.T.L.

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[70] *Didascalia et Constitutiones Apostolorum*, 8, 32, (ed. Funk, Paderbornae, 1905), pp. 534-536.

PROMISCUITY OF RITE

A correspondent of The Jurist questions the writer's interpretation of his sources in arriving at the view expressed in the April number, that both the celebration of Mass in a church of an alien Rite and the reception of Holy Communion according to the liturgy of an alien Rite are justified only when *some* reasonable cause is present. This note is added here that the reader may consult the sources that were indicated.

The correspondent, moreover, suggests that the purpose of instructing the laity of the Latin Rite in the liturgy of the Oriental Rite would be sufficient reason, if reason were needed. To this an obvious question presents itself. One may ask, would it be lawful for ministers of the Latin Rite to celebrate a solemn high Mass in a church of the Oriental Rite and to administer Holy Communion to the laity there under the form of one species, merely for the purpose of instructing the laity of the Oriental Rite in the Latin liturgy?

Jerome D. Hannan

Decrees and Decisions

CANONICAL

The Reservation of Capitular Dignities

On June 15, 1940 the Sacred Congregation of the Council solved a case involving the reservation of dignities in the Cathedral Chapter of Catania.

Briefly the facts of the case are as follows. Before 1565 the Cathedral Chapter of Catania was monastic: in that year Pope Pius IV converted this monastic chapter into a secular chapter permitting the Ordinary of Catania to fill vacancies as they should arise. This arrangement was approved by Pope St. Pius V. Finally, in 1639 the Bishop of Catania added a fifth dignity to the four established by Pope Pius IV. All these dignities over the years had been filled by the Ordinary of Catania. This continued even after the promulgation of the Code by virtue of an alleged apostolic privilege. On the plea of the Apostolic Datary, the Sacred Congregation of the Council examined the situation in the light of the Code of Canon Law.

In its decision, the Sacred Congregation of the Council declared that the fifth dignity was obviously founded without an apostolic privilege and therefore its provision was now certainly reserved to the Holy See.

The Sacred Congregation of the Council also demonstrated that the same reservation affected the four dignities established by Pope Pius IV. The following is the argument.

According to the Chancery Rules in use at the time the dignities involved were not reserved. Hence the Ordinary of Catania can draw no strict right from the Bull of St. Pius V. Although this Bull did confirm the right of the Ordinary of Catania to confer these dignities, at the same time it merely stated the common law of the year 1568. Consequently, since this law is changed in the Code, a different disposition is necessary.

Further, since a custom antedating 1565 had been offered in defense of the right of the Ordinary, the Sacred Congregation of the

Council examined this aspect of the case and established that while the custom had been approved by the Holy See, it still remained a custom. It did not change its nature. Therefore, it did not become an apostolic privilege.

The Sacred Congregation of the Council went even further. Assuming that an apostolic privilege might have been involved, the Congregation none the less declared it was abrogated by the provision of C. 1435, § 1. This canon states that all dignities in Cathedral and Collegiate Churches are reserved to the Holy See.

The question in form: After the promulgation of the Code, are the dignities of the Cathedral Chapter of Catania reserved to the Holy See? The answer: Yes.[1]

[1] *Acta Apostolicae Sedis*, XXXIII (1941), 70-72.

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SACRA CONGREGATIO PRO ECCLESIA ORIENTALI

DECRETUM

PRO SPIRITUALI ADMINISTRATIONE ORDINARIATUUM GRAECO-RUTHENORUM IN FOEDERATIS CIVITATIBUS AMERICAE SEPTEMTRIONALIS [1]

Per Decretum " Cum data fuerit ", die 1 m. Martii, a. 1929, a S. Congregatione pro Ecclesia Orientali datum, spirituali administrationi Ordinariatuum Graeco-Ruthenorum in Foederatis Civitatibus Americae Septemtrionalis provisum fuit ad decennium. Cum vero, omnibus perspectis, decennali experientia compertum sit huiusmodi decretum vitae religiosae fidelium illarum regionum valde profuisse, S. haec Congregatio, praehabitis votis Exemorum P. D. Hamleti Ioannis Cicognani, Archiepiscopi tit. Laodicensis in Phrygia, in iisdem Foederatis Americae Septemtrionalis Civitatibus Delegati Apostolici, P.D. Basilii Takacs, Episcopi tit. Zeliteni ac Apostolici Exarchae pro Ruthenis e Podcarpathia, nec non P.D. Constantini Bohacewskyj, Episcopi tit. Amiseni ac Apostolici Exarchae pro Ruthenis e Galitia, paucis, quae sequuntur, mutatis vel additis, illud ad aliud decennium confirmare statuit.

[1] *AAS*, XXXIII (1941), 27.

Art. 15. Omnes rectores paroeciarum et missionum graeco-ruthenarum in Foederatis Civitatibus nominantur per Decretum proprii Ordinarii graeco-rutheni ritus, excluso quovis laicorum interventu. Iidem amovibiles sunt (ad nutum Ordinariorum graeco-rutheni ritus. Amoveri autem non poterunt absque causis gravibus et iustis).

Art. 39. (Matrimonia tum inter fideles graeco-ruthenos, tum inter fideles mixti ritus, servata forma decreti "Ne Temere" contrahi debent, ac proinde in ritu mulieris a parocho mulieris benedicenda sunt). Quod si iusta causa adsit, proterunt nuptiae celebrari in ritu viri, de iudicio et consensu Ordinarii loci.

Quae omnia, in Audientia diei 23 mensis Novembris a. 1940, referente infrascripto Cardinali a secretis, SSmus D.N. Pius div. Prov. PP. XII probavit ac rata habuit, simul iubens per Decretum S.C. pro Ecclesia Orientali publici iuris fieri.

Contrariis quibuslibet minime obfuturis.

Datum Romae, ex Aedibus S. Congregationis pro Ecclesia Orientali. die 23 mensis Novembris a. 1940.

E. Card. Tisserant, *a Secretis.*

L.S. I. Cesarini, *Adsessor.*

DECRETUM

Facultas concedendi transitum ad alium ritum deinceps uni S. Sedi reservatur.[2]

Quo firmior teneatur disciplina de cuiusvis fidelis ad nativum ritum pertinentia, SSmus D.N. Pius div. Prov. PP. XII, in Audientia diei 23 mensis Novembris anno 1940, referente infrascripto Cardinali a secretis, statuere dignatus est facultatem transeundi ab uno ad alium ritum a S. Sede tantum esse concedendam.

Cessat igitur facultas qua fruebantur Nuntii ac Delegati Apostolici ex Decreto "Nemini licere", die 6 mensis Decembris, anno 1928 dato (Cfr. A.A.S., 1928, p. 416), atque huic S. Congregationi directe reservatur iudicium de iis omnibus quae referuntur ad transitum ab uno ad alium ritum, sive de clericis sive de fidelibus agatur.

Contrariis quibuslibet minime obfuturis.

Datum Romae, ex Aedibus S. Congregationis pro Ecclesia Orientali, die 23 mensis Novembris anno 1940.

E. Card. Tisserant, *a Secretis.*

L.S. I. Cesarini, *Adsessor.*

[2] *AAS,* XXXIII (1941), 28.

SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM

HORTATIO

De Instructione, die 26 mensis Maii 1938 data, studiosius servanda.[3]

Quanta sollicitudine Ordinarii locorum ab edita huius S. Congregationis Instructione de sedulo custodienda SS. Eucharistia (A.A.S., XXX, pp. 198 sqq.) operam dederint ut in ea contentae praescriptiones sacerdotibus utriusque cleri innotescerent et ab iisdem exsecutioni mandarentur, hanc eandem S. Congregationem non utique latet.

Attamen, quo vigilantius etiam Sacratissimus hic vitae Panis ab omni defendatur iniuria, huic sacro Dicasterio supervacaneum visum non est eosdem Ordinarios denuo hortari ne graventur parochos ecclesiarumque rectores omnes iterum monere ut, sollicitudine aucta, quae per praefatam Instructionem prescriptiones editae sunt sedulo planeque observent.

Quod si nihilo secius furtum aliquod sacrilegium infeliciter perpetratum forte fuerit, numquem prorsus omittant Ordinarii ipsi processum oeconomicum de quo in dicta Instructione (n. 10, litt. b), illico conficere, actaque omnia dein huic S. Congregationi deferre.

Romae, ex aedibus S. C. de Disciplina Sacramentorum, die 10 Februarii 1941.

D. Card. Jorio, *Praefectus.*

L.S. F. Bracci, *Secretarius.*

SUPREMA SACRA CONGREGATIO SANCTI OFFICII

DECRETUM

Proscriptio Libri

Feria IV, die 19 Februarii 1941

In generali consessu Supremae Sacrae Congregationis Sancti Officii Emi ac Revmi DD. Cardinales rebus fidei ac morum tutandis praepositi, audito RR. DD. Consultorum voto, damnarunt atque in Indicem librorum prohibitorum inserendum mandarunt librum qui inscribitur:

[3] *AAS*, XXXIII (1941), 57.

Stroothenke Wolfgang, *Erbpflege und Christentum.*

Et sequenti Feria V, die eiusdem mensis et anni, SSmus D. N. Pius divina Providentia Papa XII, in solita audientia Exc. D. Adsessori Sancti Officii impertita, relatam Sibi Emorum Patrum resolutionem adprobavit, confirmavit et publicari iussit.

Datum Romae, ex Aedibus S. Officii, die 22 Februarii, 1941.

Romulus Pantanetti,
Supr. S. Congr. S. Officii Notarius.[4]

Notificatio

Suprema S. Congregatio Sancti Officii, attento etiam Decreto die 26 Maii 1937 edito "De novis cultus seu devotionis formis non introducendis, deque inolitis in re abusibus tollendis" (Cfr. *A.A.S.*, 1937, pp. 304-305), associationem "La Crociata Mariana" prohibuit, primitus in civitate Pratensi erectam, et iam anno 1937 ab Etruriae Episcopis pro dioecesibus illius regionis proscriptam.[5]

Datum Romae, ex Aedibus S. Officii, die 8 Martii 1941.

Romulus Pantanetti,
Supr. S. Congr. S. Officii Notarius.[6]

DECRETUM

Proscriptio Libri

Feria IV, die 26 martii, 1941

In generali consessu Supremae Sacrae Congregationis Sancti Officii Emi ac Revmi DD. Cardinales rebus fidei et morum tutandis praepositi, audito RR. DD. Consultorum voto, damnarunt atque in Indicem librorum prohibitorum inserendum mandarunt librum postumum Luciani Laberthonnière, cui titulus:

Etudes de philosophie cartésienne et premiers écrits philosophiques, cura L. Canet editum.

Et sequenti Feria V, die 27 eiusdem mensis et anni, SSmus D.N. Pius divina Providentia Papa XII, in solita audientia Excmo ac

[4] *AAS*, XXXIII (1941), 69.
[5] Cfr. *L'Osservatore Romano* diei 31 Iulii a. 1937.
[6] *AAS*, XXXIII (1941), 69.

Revmo D. Adsessori Sancti Officii impertita, relatam Sibi Emorum Patrum resolutionem adprobavit, confirmavit et publicari iussit.

Datum Romae, ex Aedibus Sancti Officii, die 29 martii 1941.

I. Pepe, *Supr. S. Congr. S. Officii Substitutus Notarius.*[7]

DECRETUM

De Praevia Librorum Censura

Cum pluries acciderit ut decreto Supremae S. Congregationis S. Officii prohiberi aut e commercio retrahi debuerint libri, qui cum praescripta licentia Ordinariorum editi erant, eadem Sacra Congregatio S. Officii locorum Ordinarios et Superiores religiosos enixe hortatur, ut in curanda praevia censura librorum caute omnino procedant et licentiam edendi ne concedant, nisi postquam a censoribus *idoneis, in re vere peritis,* ad examen deputatis sententiam faventem habuerint.

Datum Romae, ex Aedibus Sancti Officii, die 29 martii 1941.[8]

SACRA PAENITENTIARIA APOSTOLICA

DECRETUM

Sacerdotibus, qui in peculiaribus custodiae locis detinentur, facultas conceditur sacramentalem eorum confessionem audiendi, qui iisdem in locis quavis de causa commorantur.

Ut facilius spirituali eorum saluti prospiciatur qui nunc temporis in peculiaribus custodiae locis a publica Auctoritate detinentur, Sacra Paenitentiaria Sacerdotibus, qui eamdem vitae rationem participant, Apostolica Auctoritate, concedit facultatem confessionem sacramentalem eorum omnium audiendi, qui vel in iisdem conditionibus versantur vel pro suo munere in iisdem locis commorantur, dummodo praedicti Sacerdotes iurisdictionem ad confessionem excipiendas a proprio Ordinario iam habuerint neque eadem privati fuerint.

Facta autem de his relatione SSmo Domino Nostro Pio div. Prov. Pp. XII ab infra scripto Cardinale Paenitentiario Maiore in Audi-

[7] *AAS*, XXXIII (1941), 121.

[8] *AAS*, XXXIII (1941), 121.

entia diei 15 vertentis mensis, idem SSmus Dominus Noster Decretum Sacrae Paenitentiariae approbavit, confirmavit et publicandum mandavit.

Datum Romae, ex aedibus S. Paenitentiariae, die 22 Februarii 1941.

L. Card. Lauri, *Paenitentiarius Maior.*

L.S. S. Luzio, *Regens.*[9]

DECRETUM

Indultum Circa Pia Exercitia per Mensem Agenda.

Ssmus Dominus Noster Pius div. Prov. Pp. XII, in audientia infra scripto Cardinali Paenitentiario Maiori die 15 mensis Februarii vertentis anni concessa, haec quae sequuntur benigne decernere dignatus est:

Eo fere modo, quo de pio Exercitio per mensem agendo in honorem S. Ioseph a S. Congregatione de Indulgentiis die 18 mensis Iulii 1877 statutum est (cfr. *Preces et pia Opera Indulgentiis ditata*, ed. 1938, n. 428 sub nota), quotiescumque opportunum ducitur pia id genus Exercitia, in ecclesiis vel publicis aut (pro legitime utentibus) semipublicis oratoriis per mensem publice peracta, die festo absolvere, qui non sit postremus eiusdem mensis dies, idque vel ex eo quod christifidelibus facilius evadat ad sacram Confessionem et ad sacram Synaxim sub fine pii huius Exercitii accedere, vel ex alia iusta causa, tum idem Exercitium incipere quovis die licet sive illius mensis, qui ex more celebratur, sive mensis antecedentis, ita tamen ut Exercitium per triginta dierum spatium peragatur.

Contrariis non obstantibus quibuslibet.

Datum Romae, ex aedibus S. Paenitentiariae, die 10 Martii 1941.

L. Card. Lauri, *Paenitentiarius Maior.*

L.S. S. Luzio, *Regens.*[10]

[9] *AAS*, XXXIII (1941), 73.

[10] *AAS*, XXXIII (1941), 129.

Synod Proclaimed at Fargo

A Synod is announced in The Diocese of Fargo for September 28-29 by Most Rev. Aloisius J. Muench, D.D., with the appointment of the following officers:

Officiales Synodi

Promotor Synodi: Ill.mus ac Rev.mus D. Leo Dworschak, V.G.
Procurator Cleri: Rev. D. Gulielmus McNamee.
Secretarius: Rev. D. Siegfriedus W. Heyl, S.T.D.
Notarius: Rev. D. H. Howard Smith.

Commissiones Praeparatoriae Quinque

I. De Personis: Admodum reverendus G. C. Bierens, praeses; admodum reverendus J. C. Berard, reverendi domini Theodorus A. Kupka, J. A. Thiel, Carolus Hobelsberger.

II. De Sacramentis in genere; de Baptismo, Confirmatione, SS. Eucharistia, Poenitentia, Extrema Unctione: Admodum reverendus Joannes M. Garland, praeses: Ill.mus ac Rev.mus D. Mattheus Fletcher, reverendi domini E. J. Eckhart, J. M. Belleau, Antonius Richard.

III. De Matrimonio, Sacramentalibus, Locis et Temporibus Sacris: Admodum Christopherus Ward, praeses; admodum reverendi domini Bonifacius Stuetz, Philippus McGee, reverendi domini Adam Hunkler, O.S.B., A. H. Rondard.

IV. De Cultu Divino, Magisterio Ecclesiastico: Admodum reverendus Eduardus Geraghty, praeses; admodum reverendi domini R. V. Long. Joannes B. Greiner, reverendi domini Siegfriedus W. Heyl, S.T.D., Franciscus T. Hannaher.

V. De Bonis Temporalibus Ecclesiae, de Peculio Clericorum: Ill.mus ac Rev.mus D. Joannes Quillinan, praeses; Ill.mus ac Rev.mus D. Josephus L. Andrieux, Ill.mus ac Rev.mus D. Gulielmus T. Mulloy, admodum reverendi Petrus McGeough, Franciscus A. Meyer, Rudolphus Longpre, reverendi domini Jacobus Dawson, Georgius J. Mehok, Joannes Smith.

* * * *

The report of the Sacred Roman Rota for the last calendar year shows that it rendered a total of eighty decisions, seventy-six of which involved the question of the nullity of marriage. In twenty-one it affirmed nullity, and in fifty-five it affirmed validity. In the seventy-six cases, thirty-one were heard without any fee; and in these thirty-one decisions, eleven affirmed nullity, twenty affirmed validity.

SECULAR

Most Rev. John F. O'Hara, C.S.C., D.D., and Very Rev. Msgr. William Arnold, Chief of Chaplains, U.S.A., appeared before the Committee on Military Affairs of the House of Representatives in the middle of March, to give testimony on a bill introduced by Representative Andrew J. May of Kentucky to wipe out immorality in areas about military and naval establishments designated by the Secretaries of War and the Navy.

* * * *

Good Friday became a legal holiday in the State of Indiana by legislation passed in March.

* * * *

The legislature of the State of Washington passed a bill in March, signed by Governor Arthur Langley, authorizing the transportation of pupils of private and parochial schools in school buses paid for by the taxpayers, stating among reasons for the measure that it is a "matter of paramount concern to this state to provide an opportunity and adequate facility to every child of school age, in every school district within the State of Washington, to obtain and procure an education", and that "it is also of vital importance to minimize traffic hazards to which children of school age are subjected upon roads and highways."

* * * *

Thomas J. Herbert, Attorney General, issued an opinion to Carl W. Rich, Hamilton County prosecutor, in which he stated that public school boards of education in Ohio may permit religious instruction to be given in public school rooms when these are not in actual use for public school purposes, and may give pupils leave of absence one hour a week to receive religious instruction, when their absence from regular classes does not injure their school standing.

* * * *

On April 4 Governor Charles L. Sprague of Oregon turned over to the Secretary of State without his signature the bill passed by the Oregon Legislature which authorizes the State educational authorities to provide free text books for the use of pupils in parish and private elementary schools. Under the Oregon Constitution the measure thus will automatically become law at the expiration of ninety days. The bill passes the house by a vote of 41 to 19, and the senate by 18 to 9. A school is defined as standard in which all teachers hold a "valid Oregon teaching certificate of the proper teaching level."

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A secular newspaper was criticized for carrying an advertisement advocating birth control in a statement by the Jefferson County, Kentucky, Grand Jury to Criminal Court Judge Mix.

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In Mexico City the Supreme Court has decided that "the authorities can not prevent the exercise of private worship and that priests, of any religion, may freely exercise their ministry in private homes. Article X of the Law

Regulating Article 130 of the Constitution with respect to religious matters, established that "religious acts practised within the home shall not be construed as public worship". But as interpreted by certain officials, the presence of a priest or someone outside the family at family worship, constituted public worship and therefore rendered the home subject to seizure under the Law for the Nationalization of Property.

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Despite a vigorous protest made by Most Rev. Canuto J. Reyes y Valladares, Bishop of Granada, the Congress of Nicaragua has enacted a law giving preference to civil marriages over religious ceremonies and making a civil marriage compulsory. In rural sections the religious ceremony may precede with the understanding that the civil ceremony will take place within fifteen days.

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A decree of the Vichy Government requires that three years elapse between the application for a divorce and its granting.

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The Vichy Government has also modified the law, one hundred and fifteen years old, which limited the capacity of establishments of women's religious congregations to receive universal legacies. The same law prevented a religious from willing to such an establishment, or to one of its members, more than one-fourth of her estate, unless the legacy was not more than ten thousand francs. The new law raises this amount to one hundred thousand francs.

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The "Journel Officiel" has published a law relative to religious instruction in the French colonies. It specifies that religious instruction, given outside of school buildings, is to be taken into consideration as part of the regular school work in Guiana, Inini, St. Pierre and Miquelon, Reunion and the French possessions in the West Indies.

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The territorial legislature of Hawaii has made Good Friday and Lincoln's Birthday legal holidays in the territory.

Chronicle

GENERAL

On March 12 Solemn Pontifical Mass was celebrated by His Excellency, Most Rev. Amleto Giovanni Cicognani, D.D., Apostolic Delegate to the United States, in the Shrine of the Immaculate Conception, commemorating the second anniversary of the coronation of His Holiness Pope Pius XII. Most Rev. Francis J. Spellman, D.D., delivered the sermon. Members of the diplomatic corps, including the Ambassadors of Great Britain and France, and high government officials attended.

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His Holiness, Pope Pius XII, addressed the world on Pentecost Sunday, in observance of the anniversaries of the two great encyclicals, the golden jubilee of "Rerum Novarum" and the tenth anniversary of "Quadragesimo Anno".

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His Holiness, Pope Pius XII, designated as his Legate to the Ninth National Eucharistic Congress, to be held in St. Paul, June 23-26, His Eminence Dennis Cardinal Dougherty, Archbishop of Philadelphia.

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The English translation of the Easter message of His Holiness Pope Pius XII was broadcast from the Vatican City Radio Station by Rev. Walter Carroll, S.T.D., J.C.D., a priest of the Diocese of Pittsburgh, attached to the Papal Secretariat of State.

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The golden jubilee of "Rerum Novarum" and the tenth anniversary of "Quadragesimo Anno" were celebrated in New York, Chicago, and Buffalo during May. In New York two thousand workmen from one hundred unions took part in a triduum, the sermons of which were preached by Most Rev. J. Francis A. McIntyre, D.D., Rev. Wilfrid Parsons, S.J., and Rt. Rev. Msgr. Fulton J. Sheen. In Chicago Pontifical Mass was celebrated by Most Rev. Edwin V. O'Hara, D.D., and the sermon was preached by Rt. Rev. Msgr. John A. Ryan, S.T.D. Bishop O'Hara and United States Senator Joseph C. O'Mahoney, of Wyoming, spoke at a meeting in the Stevens Hotel. April 27 was "Encyclical Sunday" for all parish churches in Buffalo. In Kansas City a symposium was held on "The Good Life", opening with a Mass celebrated by Most Rev. Edwin V. O'Hara, D.D., and a sermon by Rt. Rev. John A. Ryan, S.T.D.

Addressing the lay students of the Catholic University of America at their annual communion breakfast on March 2, United States Senator Joseph C. O'Mahoney, of Wyoming, asserted that religion and democracy are parts of the same concept. The Senator's talk closed the annual retreat of the students, conducted by Rev. Robert J. Slavin, O.P., of the Faculty of the School of Philosophy.

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Rt. Rev. Peter M. H. Wynhoven has been appointed chairman of the Gulf Shipbuilding Stabilization Conference by Sidney Hillman, associate director-general of the Office of Production Management. Monsignor Wynhoven is president of the Catholic Press Association and editor of "Catholic Action of the South". He was formerly chairman of the United States Regional Labor Board and of the Louisiana State Cotton Textile Industrial Relations Board.

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The Governing Board of the National Catholic Community Service met in March at the headquarters of the National Catholic Welfare Conference. The Board represents the trustees of this agency which was established by the Hierarchy at its November meeting. The trustees include the Archbishops and Bishops of the Administrative Board of the National Catholic Welfare Conference, and Most Rev. Francis J. Spellman, D.D., Military Vicar, and Most Rev. John F. O'Hara, C.S.C., D.D., Military Delegate. The Governing Board consists of the two latter and Most Rev. Edward Mooney, D.D., Chairman of the Administrative Board of the N.C.W.C., and Most Rev. John A. Duffy, D.D. There is an Executive Committee of the agency, of which the Chairman is Francis P. Matthews, Supreme Knight of the Knights of Columbus. Other members of the Executive Committee are Luke E. Hart, Supreme Advocate of the Knights of Columbus; Mary G. Hawks, former president of the National Council of Catholic Women; Rev. Bryan J. McEntegart and Rev. Howard J. Carroll.

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Dr. Franklin Dunham, educational director of the National Broadcasting Company, was appointed executive director of the National Catholic Community Service. He is at present a lecturer at Teachers' College, New York, and professor of Social Philosophy at the Crown Point Labor School, Brooklyn. He is a member of the Archbishop's Committee on Charities in the Archdiocese of New York, and of the American Citizenship Committee of the Catholic University of America.

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Dr. Franklin Dunham, executive director of the National Catholic Community Service, appointed late in May an administrative assistant, James J. Norris, of Elizabeth, N. J., and four field supervisors: John J. Spillane, of Worcester, Mass.; Gerard Janeske, of Forest Hills, N. Y.; Bernard J. O'Shea, Richmond Hill, L. I.; Frank E. Crane, Pasadena, Calif. Paul J. Maholchic,

Woodside, L. I.; and John Zimmerman, New Orleans. Daniel C. Culhane, of Chicago, was named national program director. Mr. Spillane died before taking up his duties.

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At a meeting of the National Council of Catholic Women in Washington, D. C., in the middle of March, Anne Sarachon Hooley, of Kansas City, Missouri, was named assistant director of the National Catholic Community Service. Mrs. J. W. McCollum, head of the National Council, is vice chairman of the advisory committee of Community Service.

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Following the regular semi-annual meeting in April of the Administrative Board of the National Catholic Welfare Conference, it issued a statement emphasizing the five "Just Peace" points; endorsed the Catholic Community Service as an essential "spiritual agency" for the welfare of the Nation's defenders; asked financial support when appeal is made in June for funds; and urged prayers for peace.

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Most Rev. Edward Mooney, D.D., Archbishop of Detroit and chairman of the board of trustees of the National Catholic Community Service, has been named co-chairman of the Clergy Advisory Board of the United Service Organizations for National Defense.

Rt. Rev. Msgr. Robert F. Keegan, secretary for charity in New York, was named chairman of the New York Archdiocesan Committee of the National Community Service.

John S. Burke and Mrs. Carlton J. H. Hayes have been elected directors of the United Service Organizations for National Defense.

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On March 7, at the headquarters of the National Catholic Welfare Conference, Washington, D. C., the National Defense Committee of the National Conference of Catholic Charities pledged full support to the work of the National Catholic Community Service at military camps and naval bases, and in defense industry centers. Present at the meeting were Most Rev. John F. O'Hara, C.S.C., D.D., Military Delegate; Very Rev. William Arnold, Chief of Chaplains, U. S. A.; Most Rev. John O'Grady, Ph.D., Secretary of the National Conference of Catholic Charities; and Most Rev. Bryan J. McEntegart, President of the National Conference of Catholic Charities.

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Most Rev. John B. Peterson, D.D., Bishop of Manchester, President General of the National Catholic Educational Association, preached at the Mass opening the thirty-eighth annual convention in New Orleans on Wednesday, April 16. Most Rev. Joseph F. Rummel, D.D., spoke at the public meeting Wednesday evening in the Municipal Auditorium. Present at the convention were Most Rev. Vincent J. Ryan, D.D., Bishop of Bismarck and President of the National Catholic Rural Life Conference, who spoke on "The Rural Problem and the Seminary"; Most Rev. Gerald P. O'Hara, D.D., J.C.D., Bishop of

Savannah-Atlanta, who spoke on "How Can Our Schools Produce Better Catholics?"; Most Rev. Thomas J. Toolen, D.D., Bishop of Mobile; Most Rev. Richard O. Gerow, D.D., Bishop of Natchez; Most Rev. Jules B. Jeanmard, D.D., Bishop of Lafayette; Most Rev. Daniel F. Desmond, D.D., Bishop of Alexandria; Most Rev. John B. Morris, D.D., Bishop of Little Rock, and Most Rev. Albert L. Fletcher, D.D., Auxiliary Bishop of Little Rock. The convention adopted resolutions endorsing the National Defense Program and urging cooperation with the Ibero-American countries as a requisite for adequate defense of the United States.

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The thirty-first annual convention of the Catholic Press Association was held in Peoria May 21-24. Most Rev. Samuel A. Stritch, D.D., preached the sermon at the opening Mass. Emphasis was laid on the principles of the two great encyclicals and on the five points of a "Just Peace" laid down by His Holiness, Pope Pius XII.

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The twenty-sixth annual convention of the Catholic Hospital Association of the United States and Canada was held in Philadelphia June 16-20, with emphasis in its discussions on problems arising out of the National Defense Program.

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On April 14 the Fifteenth Annual Conference of the Catholic Association for International Peace was held at Trinity College, Washington, D. C. The theme of the conference was "America's Peace Aims". Dr. John L. McMahon, of the Catholic University of America, was reelected president and Rev. Raymond A. McGowan, executive secretary. Dr. McMahon's paper on "The Vatican and the World Crisis" was read in his absence. The Catholic Student Peace Federation held its Fifth Annual Conference at Trinity College on April 15.

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The National Federation of Catholic College Students held its second two-day National Congress at Georgetown University on April 14-15. At the closing general session, Gertrude Stevenson, Immaculata, Pa., presented "Methods of Promoting Interest in the Two Great Encyclicals". A study of these Encyclicals was the theme of the Congress.

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A two-day Catholic Conference on Industrial Problems was held in St. Louis early in March at which Most Rev. John J. Glennon, D.D., gave the concluding address. Most Rev. Joseph M. Gilmore, D.D., Bishop of Helena, attended.

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On May 17, broadcasts preparatory for "Biblical Sunday", to be observed the following day, were delivered by Most Rev. John T. McNicholas, D.D., and Most Rev. Edwin V. O'Hara, D.D. The observance honored the publication of the revised English translation of the New Testament.

A second province of the Augustinian Fathers has been formed from the Province of St. Thomas of Villanova. It includes the houses in the midwest. The acting provincial is Very Rev. Patrick H. Kehoe, O.S.A., prior of St. Rita's Church, Chicago.

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The first number of "Franciscan Studies" appeared in April. It is a quarterly review of the sacred and secular sciences, published by the Franciscan Educational Conference, with headquarters at St. Bonaventure's College. Very Rev. Thomas Plassman, O.F.M., is managing editor; and Rev. Marion Habig, O.F.M., of Quincy College, is editor.

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The College of Franciscan Culture and Sciences located in Assisi since its foundation in 1930, has been transferred to the General Curia in Rome and given the name "Historical Institute of the Capuchin Friars Minor". Its publication appears three times monthly and is named "Collectanea Franciscana".

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The episcopal Committee on the Confraternity of Christian Doctrine has received the revised text of the Baltimore Catechism, which the Catechetical Section of the Sacred Congregation of the Council has carefully examined through a special committee. The episcopal committee was appointed in 1934 and consists of Most Rev. John T. McNicholas, D.D., Most Rev. John Gregory Murray, D.D., and Most Rev. Edwin V. O'Hara, D.D.

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Eighteen prelates signed a plea for feeding non-combatants in the war zone. Heading the list were His Eminence William Cardinal O'Connell, D.D., Most Rev. John T. McNicholas, D.D., and Most Rev. John A. Floersh, D.D.

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The Bishop's Committee for the Montezuma Seminary, at a meeting in San Antonio, reviewed the work done by the seminary, which is located at Las Vegas, N. M., and which has an enrollment of three hundred sixty-six students.

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Most Rev. James E. Kearney, D.D., Bishop of Rochester, is episcopal moderator of the Newman Club Federation, which is now a member of the National Catholic Youth Council.

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The Eucharistic Congress of the Eastern Rites was held in Chicago, June 25-29, in St. Nicholas' Church under the auspices of Most Rev. Constantine Bohachevsky, Bishop of Amissus and Ordinary of the Ukrainian Greek Catholic Diocese in the United States.

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Rev. Joseph T. Tinnelly, C.M., second year law student at St. John's University, Brooklyn, is editor in chief of the school's Law Review.

UNIVERSITY

The Commencement Exercises of The Catholic University of America were observed with a solemn high Mass celebrated in the Shrine of the Immaculate Conception on Sunday, June 8, at eleven o'clock. The celebrant was the Right Reverend Vice Rector, Monsignor Patrick J. McCormick, Ph.D. The sermon was preached by Very Reverend Thomas E. Mitchell, S.T.D., Dean of the School of Social Work. The conferring of diplomas took place on Wednesday, June 11, with the following order of exercises.

Processional .....The Catholic University Band, Mr. Paul Leman, Director

Presiding .....The Apostolic Delegate

Invocation .....The Apostolic Delegate

Announcements .....The Vice Rector of the University

Oremus pro Pontifice Nostro Pio.....The Catholic University Choir, Dr. Leo Behrendt, Director

Pope Pius Twelfth .....The Rector of the University

Recognition of the Deans of the Schools of the University .....The Vice Rector of the University

Conferring of Degrees in Course:

The School of Social Science

The School of Nursing Education

The School of Social Work

The School of Engineering and Architecture

The Catholic Sisters College

The Summer Session

The College of Arts and Sciences

The Graduate School of Arts and Sciences

The School of Law

The School of Philosophy

The School of Canon Law

The School of Sacred Theology

Presentation of Candidates for Honorary Degrees .....The Vice Rector of the University

Conferring of Degrees Honoris Causa:

Doctor of Laws (LL.D.)

His Excellency Julio Tobar Donoso, Minister of Foreign Affairs of Ecuador
His Excellency Jefferson Caffery, United States Ambassador to Brazil

Address .....The Honorable Adolf A. Berle, Jr., Assistant Secretary of State

Alma Mater .....The Catholic University Choir

The Star-Spangled Banner .....The Catholic University Band

Benediction .....The Apostolic Delegate

Recessional .....The Catholic University Band

Twenty-six students of the School of Canon Law received the degree J.C.B.; thirty-four, the degree J.C.L.; and twenty-one, the degree J.C.D. Their names, with the titles of the doctoral dissertations submitted, are as follows.

Bachelor in Canon Law (J.C.B.)

Rev. Matthew A. Benko, O.S.B., A.B. .....Latrobe, Pa.
†Rev. Thomas G. Brockhaus, O.S.B., A.B. .....Mt. Angel, Oreg.
Rev. Joseph J. Christ, M.A., S.T.L. .....Chicago, Ill.
Rev. Patrick Clancy, O.P., A.B., S.T.Lr. .....Washington, D. C.
Rev. Christopher T. Clark, A.B., LL.B. .....Newark, N. J.
Rev. Thomas J. Clarke .....Indianapolis, Ind.
Rev. John P. Connolly, A.B., S.T.L. .....San Francisco, Calif.
Rev. John J. Downey, A.B. .....Boston, Mass.
Rev. William M. Drumm, A.B. .....St. Louis, Mo.
Rev. Bernard J. Flanagan, A.B., S.T.L. .....Burlington, Vt.
Rev. Charles F. Keating, A.B. .....Lansing, Mich.
Rev. Stephen J. Kelleher, A.B., S.T.B. .....New York, N. Y.
Rev. Leonard J. Kostka, C.PP.S. .....Carthagena, Ohio
Rev. Joseph Paul Larkin, A.B. .....Philadelphia, Pa.
Rev. Paul F. Leibold, A.B. .....Cincinnati, Ohio
Rev. Gordian Lewis, C.P. .....Louisville, Ky.
Rev. Charles G. Maloney, Ph.B. .....Louisville, Ky.
Rev. Adolph Marx .....Corpus Christi, Tex.
Rev. Raymond A. Matulenas, O.S.B., A.B. .....Peru, Ill.
Rev. Damasus A. Mozeris, S.T.D. .....Chicago, Ill.
Rev. Charles G. O'Leary, C.SS.R. .....Washington, D. C.
Rev. Charles J. Plauché .....New Orleans, La.
Rev. Cornelius M. Power .....Seattle, Wash.
Rev. Ralph V. Shuhler, O.S.A. .....Washington, D. C.
†Rev. Stephen F. Sullivan, S.A., A.B. .....Washington, D. C.
Rev. Thaddeus S. Ziolkowski, A.B. .....St. Cloud, Minn.

Licentiate in Canon Law (J.C.L.)

Rev. Garret Francis Barry, O.M.I., J.C.B. .....Washington, D. C.
Rev. Gatien Bolduc, C.S.V., A.B., S.T.L., J.C.B. ...Joliette, Canada

† Work completed February, 1941.

Rev. Harold Joseph Bolton, Ph.D., S.T.D., J.C.B. . . Saginaw, Mich.
Rev. David John Boyle, M.A., J.C.B. ..... Fargo, N. Dak.
Rev. Walter Joseph Canavan, M.A., M.Jour., J.C.B. Denver, Colo.
Rev. Bruno Desrochers, A.B., Ph.L., S.T.B., J.C.B. . . Quebec, Canada
Rev. Robert Edward Dillon, A.B., J.C.B. ..... Syracuse, N. Y.
Rev. Edward John Dodwell, Ph.D., S.T.B., J.C.B. . . Savannah, Georgia
Rev. Thomas Andrew Donnellan, A.B., J.C.B. ..... New York, N. Y.
Rev. Thomas Patrick Duffy, Ph.D., S.T.D., J.C.B. . . Nashville, Tenn.
Rev. Louis Anthony Eltz, A.B., J.C.B. ..... Philadelphia, Pa.
Rev. William Anthony Galvin, M.A., J.C.B. ..... Fall River, Mass.
Rev. Sylvester Francis Gass, M.A., J.C.B. ..... Milwaukee, Wis.
Rev. John Joseph Guiniven, C.SS.R., J.C.B. ..... Washington, D. C.
Rev. John Theophilus Gulczynski, J.C.B. ..... Dallas, Tex.
Rev. John Leo Hammill, M.A., J.C.B. ..... Ogdensburg, N. Y.
Rev. John Joseph Haydt, A.B., J.C.B. ..... Philadelphia, Pa.
Rev. Richard Hiester, A.B., J.C.B. ..... Denver, Colo.
Rev. Roger John Huser, O.F.M., A.B., J.C.B. ..... Washington, D. C.
Rev. Francis Patrick Kearney, A.B., S.T.L., J.C.B. . . Baltimore, Md.
†Rev. Michael James Keene, O.S.B., J.C.B. ..... St. Meinrad, Ind.
Rev. Leo James Linahen, S.T.L., J.C.B. ..... Portland, Oreg.
Rev. Joseph Aloysius McCloskey, A.B., J.C.B. ..... Philadelphia, Pa.
Rev. Francis Joseph O'Neill, C.SS.R., J.C.B. ..... Washington, D. C.
Rev. Adolph Anthony Oser, J.C.B. ..... Lansing, Mich.
Rev. John Edward Prince, A.B., S.T.B., J.C.B. .... Spokane, Wash.
Rev. John Alexander Richmond, S.M., J.C.B. ..... Washington, D. C.
Rev. Albert Joseph Riesner, C.SS.R., J.C.B. ..... Washington, D. C.
Rev. John Francis Smith, C.SS.R., J.C.B. ..... Washington, D. C.
Rev. James Kenneth Spurlock, A.B., S.T.D., J.C.B. Leavenworth, Kans.
Rev. Joseph Bernard Stenger, J.C.B. ..... Belleville, Ill.
Rev. Joseph Francis Waldron, A.B., J.C.B. ..... Philadelphia, Pa.
Rev. Robert Albert Willett, J.C.B. ..... Louisville, Ky.
Rev. Edward Martin Woeber, M.A., J.C.B. ..... Denver, Colo.

Doctor in Canon Law (J.C.D.)

Rev. Thomas Francis Anglin, M.S., J.C.L. ..... Bloomfield, Conn.
Dissertation: *"The Eucharistic Fast"*

Rev. John Jerome Coleman, J.C.L. ..... Spokane, Wash.
Dissertation: *"The Minister of Confirmation"*

Rev. John Emmanuel Downs, A.B., J.C.L. ..... New York, N. Y.
Dissertation: *"The Concept of Clerical Immunity"*

Rev. Arthur Joseph Dubé, A.B., J.C.L. ..... Berwick, Me.
Dissertation: *"The General Principles for the Reckoning of Time in Canon Law"*

Rev. Anthony Albert Esswein, J.C.L. ..... St. Louis, Mo.
Dissertation: *"Extrajudicial Penal Powers of Ecclesiastical Superiors"*

† Work completed February, 1941.

Rev. Benjamin Francis Farrell, M.A., S.T.L., J.C.L. Wheeling, W. Va.
Dissertation: *"The Rights and Duties of the Local Ordinary Regarding Congregations of Women Religious of Pontifical Approval"*

Rev. Thomas John Feeney, A.B., S.T.L., J.C.L. ....Davenport, Iowa
Dissertation: *"Restitutio in Integrum"*

Rev. Stephen William Findlay, O.S.B., A.B., J.C.L. Newark, N. J.
Dissertation: *"Canonical Norms Governing the Deposition and Degradation of Clerics"*

Rev. John Aloysius Goodwine, A.B., S.T.L., J.C.L...New York, N. Y.
Dissertation: *"The Right of the Church to Acquire Property"*

Rev. Edward Louis Heston, C.S.C., Ph.D., S.T.D., J.C.L. .....Notre Dame, Ind.
Dissertation: *"The Alienation of Church Property in the United States"*

Rev. James John Hogan, S.T.L., J.C.L. .....Trenton, N. J.
Dissertation: *"Judicial Advocates and Procurators"*

Rev. Thomas Mitchell Kealy, A.B., LL.B., J.C.L....Lincoln, Nebr.
Dissertation: *"Dowry of Women Religious"*

Rev. Charles Augustine Kerin, S.S., M.A., S.T.B., J.C.L. .....Washington, D. C.
Dissertation: *"The Privation of Christian Burial"*

Rev. William Francis Louis, M.A., J.C.L. .....Paterson, N. J.
Dissertation: *"Diocesan Archives"*

Rev. James T. McBride, A.B., J.C.L. .....Philadelphia, Pa.
Dissertation: *"Incardination and Excardination of Seculars"*

Rev. Gilbert Joseph McDevitt, A.B., J.C.L. .....Philadelphia, Pa.
Dissertation: *"Legitimacy and Legitimation"*

Rev. Thomas Joseph McDonough, A.B., J.C.L. ....Philadelphia, Pa.
Dissertation: *"Apostolic Administrators"*

Rev. Carl Anthony Meier, A.B., J.C.L. .....Des Moines, Iowa
Dissertation: *"Penal Administrative Procedure Against Negligent Pastors"*

Rev. John Rogg Schmidt, A.B., J.C.L. .....Amarillo, Tex.
Dissertation: *"The Principles of Authentic Interpretation in Canon 17 of the Code of Canon Law"*

Rev. Andrew Leonard Slafkosky, A.B., J.C.L. .....Philadelphia, Pa.
Dissertation: *"The Canonical Episcopal Diocesan Visitation of the Diocese"*

Rev. Innocent Robert Swoboda, O.F.M., J.C.L. ....St. Louis, Mo.
Dissertation: *"Ignorance in Relation to the Imputability of Delicts"*

DIGNITIES

His Eminence, Pietro Cardinal Fumasoni-Biondi, Prefect of the Sacred Congregation for the Propagation of the Faith became Camerlengo of the Sacred Congregation of Cardinals at the Secret Consistory on May 12.

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On March 27, Most Rev. Robert E. Lucey, D.D., was installed as second Archbishop of San Antonio. The Most Reverend Apostolic Delegate spoke at a civic reception on the night preceding, using the topic "Faith—Its Inspiring and Beneficent Role."

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Most Rev. Francis J. Magner, D.D., was installed as seventh Bishop of Marquette by Most Rev. Edward Mooney, D.D., in the presence of four archbishops and ten bishops, in St. Peter's Cathedral, Marquette.

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On March 19, Most Rev. Joseph T. McGucken, D.D., was consecrated Titular Bishop of Sanavo and Auxiliary Bishop of Los Angeles in St. Vibiana's Cathedral, Los Angeles. Most Rev. John J. Cantwell, D.D., Archbishop of Los Angeles, was consecrator. Co-consecrators were Most Rev. Daniel J. Gercke, D.D., Bishop of Tucson, and Most Rev. Philip G. Scher, Bishop of Monterey-Fresno.

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Most Rev. James Joseph Sweeney, archdiocesan director of the Society for the Propagation of the Faith of San Francisco, becomes the first Bishop of Honolulu, embracing the Hawaiian Islands, succeeding the late Bishop Stephen P. Alencastre, the last Vicar Apostolic.

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Very Rev. Daniel Joseph Hannon, Vicar General of the Diocese of Cardiff, Wales, was appointed Bishop of Menevia, Wales, succeeding Most Rev. Michael McGrath, who was transferred to the See of Cardiff in March 1940.

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Rt. Rev. Msgr. Francis W. Walsh, pastor of St. Gabriel's Church, New York City, was appointed Vicar-Delegate of the Military Ordinariate. He was a chaplain in the World War, serving overseas with the 307th Infantry of the 77th Division.

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Most Rev. William A. Griffin, D.D., Bishop of Trenton, and Most Rev. Richard J. Cushing, D.D., Auxiliary Bishop of Boston, were added to Catholic Medical Mission Board at its meeting in New York, March 20.

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Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, was appointed Assistant at the Pontifical Throne.

Most Rev. Frank A. Thill, D.D., Bishop of Concordia, and Most Rev. Christian H. Winkelmann, D.D., Bishop of Wichita, have been named Knights Commander of the Order of the Holy Sepulchre by the Latin Patriarch of Jerusalem.

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Very Rev. Claude Vogel, O.F.M. Cap., was named Provincial of St. Augustine's Province of the Capuchin Order, succeeding the late Very Rev. Sigmund Cratz, O.F.M.Cap.

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The rank of Domestic Prelate was conferred on Rev. John H. Metzdorf, pastor of St. Martin's Church, Cheviot; Very Rev. Msgr. Walter A. Roddy, rector of St. Gregory's Seminary; and Very Rev. James W. O'Brien, rector of St. Mary's Seminary, all of the Archdiocese of Cincinnati; on Rt. Rev. Louis M. Maucher, Rt. Rev. Jerome L. McQuillen, and Rt. Rev. William E. Downes, all of the Diocese of Altoona; and on Rt. Rev. David F. Cunningham, S.T.L., J.C.L., Chancellor of the Diocese of Syracuse.

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William F. Montavon, director of the Legal Department, National Catholic Welfare Conference, was named a member of the Advisory Committee on Policy, Office of the Coordinator of Commercial and Cultural Relations between the American Republics. Nelson Rockefeller is Coordinator. Rev. George Johnson, Ph.D., Director of the Department of Education of the National Catholic Welfare Conference has been named to the Committee on the Part of Schools.

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At the thirty-eighth annual meeting of the Middle States Association of History and Social Science Teachers, held in Philadelphia, Dr. Richard J. Purcell, head of the Department of History at The Catholic University of America, was elected President.

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William Thomas Walsh, educator and author, was awarded the 1941 Laetare Medal at the University of Notre Dame. He is professor of English at Manhattan College of the Sacred Heart, New York.

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John H. Wourms was awarded the annual De Smet Medal of Gonzaga University. Mr. Wourms is an attorney of Wallace, Idaho, noted for his labors in the Catholic Laymen's Retreat Movement and in the cause of Catholic education in the Northwest.

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Dr. Eugene M. K. Geiling, professor of Pharmacology at the University of Chicago, received the Mendel Medal from Villanova College for outstanding achievement in science, his field being insulin and gland studies.

United States Senator Robert F. Wagner received the De La Salle Medal from the Civil and Social Congress of La Salle College for "distinguished service in the cause of social justice and economic security".

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Linna E. Bresette, field secretary of the Catholic Conference on Industrial Problems, received the annual Immaculata Medal for distinguished social service from Conception College, Conception, Mo.

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Dr. Edward A. Doisy, head of the Department of Biochemistry, St. Louis University, received the 1941 Willard Gibbs Medal for world-wide recognition of his researches in Vitamin K.

DEATHS

Pontifical Requiem Mass was sung on April third for Rt. Rev. Msgr. John T. O'Connell, Vicar General of the Diocese of Toledo. He was trustee of The Catholic University of America and of De Sales' College. He celebrated his golden jubilee of ordination in 1935.

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Rt. Rev. Gilbert P. Jennings, pastor of St. Agnes' Church, Cleveland, died at Miami on April 17 in his eighty-fifth year. He was a charter member of the Catholic Church Extension Society and a member of its Board of Governors at his death.

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Pontifical Mass was sung in the Cathedral at Wheeling by Most Rev. John J. Swint, D.D., on May 23 for Rt. Rev. Edward E. Weber, seventy-one years old, Chancellor and Vicar General of the Diocese.

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Members of the diplomatic corps assisted at the Pontifical Mass celebrated in the Shrine of the Immaculate Conception for Rt. Rev. Henry Hyvernat, member of the faculty of the Catholic University of America from its beginning, who died May 29.

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On March 8, the death of Karl Joseph Cardinal Schulte, Archbishop of Cologne, was announced. He had been Archbishop of Cologne since January 15, 1915. He was born September 14, 1871.

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On April 21, His Eminence Karel Cardinal Kaspar, Archbishop of Prague, died in his seventy-first year. He was raised to the Cardinalate in 1935.

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On March 6, Most Rev. Henry Thomas Renouf, Bishop of St. George, Newfoundland, died at the age of sixty-eight. He had been Bishop of St. George for more than twenty years.

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Most Rev. Johannes Biermans, Titular Bishop of Gargara and former General of the Missionary Society of Mill Hill, died in Zevenaar, Holland, at the age of seventy years.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. (a) Date: April 23, 1941.

(b) Title: Roman Law and the Post-Classical Western Schools.

(c) Author: Dr. Edoardo Volterra, Professor of Roman Law, University of Bologna (read *in absentia* by Dr. Gentle Crowley, Professor of theology at the Holy Name College, Washington, D. C.).

(d) Abstract:

Professor Volterra supports Dr. Riccobono's view that the greatest gains of Roman law were the result of internal, spontaneous development of Roman elements. Byzantine jurists only faithfully and modestly interpreted the classical sources. The Western juridical sources belonging to the period before Justinian are more interesting and important than the Eastern sources. The greater part of the sources of Roman law before Justinian are found in the West. In them are to be found examples of changes brought about by the post-classical jurists on ancient classical law, as the *Collatio legum mosaicarum et Romanorum*, the *Consultatio veteris cujusdam jurisconsulti*, the *Fragmenta Vaticana*, the Fragments of Autun, the Epitome of Gaius, the Institutes of Gaius in the palimpsest of Verona, the *Tituli ex corpore Ulpiani*, the *Interpretatio Visigotica*, the Epitome of Gregorian and Hermogenian Codes.

The history of post-classical law is, in a great degree, the history of the Roman juridical tradition in the West and, above all, in Gaul. The fact that Justinian's compilation was made in Constantinople should not obscure the work of the Western jurists. Justinian's compilation conserved not only the ancient Roman law and the juridical elaboration accomplished by the Byzantine schools, but also the juridical achievements of the Western schools.

II. (a) Date: May 7, 1941.

(b) Title: The Impact of Roman Law upon American Case Law.

(c) Author: Charles M. Neff, Attorney, Lands Division, Department of Justice, Washington, D. C.

(d) Abstract:

The purpose of the paper was to illustrate by a few examples the much questioned truth that some principles of Roman law stated and developed centuries ago are occasionally helpful guides for American courts in the solution of some highly practical questions. The paper discussed cases connected with the question of compensation for expenditures made upon the property of others. According to the strict rule of the common law, no allowance was made for such improvements, however valuable or beneficial. But as a result of the impact of Roman law philosophy on American law, equity has modified this doctrine.

Among the cases considered were Bright v. Boyd (1 Story 478, 2 Story 605), Gordon v. Tweedy (74 Ala. 232), Schleicher v. Schleicher (120 Conn. 528), and Green v. Biddle (8 Wheat. R. 77 ff.).

There was a discussion of the paper by a panel consisting of Prof. Frederick J. de Sloovere, New York University Law School, Prof. Gerhart Husserl, National University Law School, and Prof. Stephan G. Kuttner, The School of Canon Law, The Catholic University of America. Rev. Michael Harding, O.F.M., *Magister*, presided.

Prof. Elliott E. Cheatham, Columbia University Law School, spoke on "Some Problems of Legal Education", and Professor Samuel Williston, Harvard University Law School, made the presentation of the Appellate Court Competition Awards.

Refreshments and a social evening followed.

The *Concilium* for 1941-1942 consists of the following:

Max Radin, *Magister*
Brendan Brown, *Scriba*
Vladimir Gsovski
Michael Harding, O.F.M.
Robert J. White
Francesco G. Lardone